INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3 - 6
FINDINGS AND DECISIONS OF THE TRIAL EXAMINER, BOARD AND COURT OF APPEALS	6 - 8
REASONS FOR GRANTING THE WRIT	9 - 19
CONCLUSION	1

APPENDIX A:	OPINION OF COURT OF APPEALS	App. 2
APPENDIX B:	DECISION OF THE NATIONAL LABOR RELATIONS BOARD AND THE TRIAL EXAMINER	App. 11
APPENDIX C:	JUDGMENT	App. 67
APPENDIX D:	DENIAL OF PETITION FOR REHEARING	App. 71
APPENDIX E:	STAY OF MANDATE	App. 73
APPENDIX F:	EXTENSION OF TIME	App. 77
APPENDIX G:	STATUTES AND CONSTITUTIONAL PROVISIONS	App. 79

CITATIONS

Cases:	Page
Adair v. United States, 208 U.S. 161	19
Detroit Bank v. United States, 317 U.S. 329	19
Dierks Forest, 148 NLRB 923 (1964)	10
Ellis v. United States, 206 U.S. 246	19
Employing Lithographers of Greater Miami, Florida v. NLRB, 301 F.2d (5th Cir. 1962)	19
Hirabayashi v. United States, 320 U.S. 81	19
I. T. & T. Corp. v. NLRB, 382 F.2d 366 (3rd Cir. 1967)	12
Local 357 Teamsters v. NLRB, 365 U.S. 667	10
Metlox Mfg. Co. v. NLRB — F.2d —, 64 LRRM 2350 (9th Cir. 1967)	12
Metlox Mfg. Co., 153 NLRB No. 124 (1965)	10
NLRB v. Arkansas Rice Growers, 400 F.2d 567 (8th Cir. 1968)	10
NLRB v. American Ins. Co., 343 U.S. 395	11, 13
NLRB v. F. W. Woolworth Co., 352 U.S. 938	10
NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 498 (1960)	11, 13

CITATIONS (Cont'd)

Cases:	Page
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	18
NLRB v. Katz, 369 U.S. 736	10
NLRB v. Local 74 United Broth. of Carpenters & Joiners of America, A.F.L., 181 F.2d 126 (6th Cir. 1950) *aff'd* 341 U.S. 707	18, 19
NLRB v. Movie Star Inc., 361 F.2d 346 (5th Cir. 1966)	10, 12
NLRB v. News Syndicate Co., 365 U.S. 695	10
NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953), *cert denied* 346 U.S. 887	11
NLRB v. Texas Coca Cola Bottling Co., 365 F.2d 321 (5th Cir. 1966)	11
NLRB v. Truitt Mfg. Co., 224 F.2d 869, (4th Cir. 1965)	9
NLRB v. Washington, Virginia & Maryland Coach Co., 85 F.2d 990 (4th Cir. 1936), *affd.* 301 U.S. 142	18
NLRB v. Western Wirebound Box Co., 356 F.2d 88 (9th Cir. 1966)	10, 12
NLRB v. Wooster Div. of Borg-Warner Corp., 353 U.S. 907	10

CITATIONS (Cont'd)

Cases:	Page
Stanley Building Specialties Co., 166 NLRB No. 110	App. 11
Sylvania Electric Products Inc. v. NLRB, 291 F.2d 132 (1st Cir. 1961)	12
Texas & P. Ry. Co. v. Broth. of R. Trainmen, 63 F.Supp. 640 (D.C. La. 1945), reversed on other grounds 159 F.2d 822 (5th Cir. 1947), *cert. denied* 332 U.S. 760	19
Truitt Mfg. Co. v. NLRB, 351 U.S. 149	9, 10, 11, 12
Truitt Mfg. Co., 110 NLRB 856 (1954)	9
United Fireproof Warehouse Co. v. NLRB, 356 F.2d 494 (7th Cir. 1966)	12
United Steelworkers of America, AFL-CIO, Local 5571 v. NLRB, 401 F.2d 434 (D.C. Cir. 1968)	2, 12
United Steelworkers of America, AFL-CIO v. NLRB, 390 F.2d 846 (D.C. Cir. 1967)	11

STATUTES AND CONSTITUTIONAL PROVISIONS

National Labor Relations Act. as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

Section 7 ..... 16, 17, 18

Section 8(a)(1) ..... App. 79

Section 8(a)(3) 8

Section 8(a)(5) 2, 7, 8, 10, 14

Section 8(d) 12, 13, 14

U. S. CONST. Amend. V. 8, 19

CONGRESSIONAL RECORD:

Cong. Rec. H.R. Rep. No. 245 80th Cong. 1st Sess. 7 13

Cong. Rec. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34 13

in the

Supreme Court

of the

United States

Term

No. _____

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Stanley-Artex Windows, Division of the Stanley Works, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in case number 21,343 on November 21, 1968.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 2-10) is reported at 401 F.2d 434. The decision and order of the National Labor Relations Board and the Trial Examiner's decision (App. B, *infra*, pp. 11-66) are reported at 166 NLRB No. 110.

JURISDICTION

The decision of the court of appeals was issued on September 3, 1968 (App. A, *infra*, p. 2) and the judgment was entered November 21, 1968 (App. C, *infra*, pp. 67-69). Petitioner's timely petition for rehearing was denied on January 2, 1969 (App. D, *infra*, p. 71-72). Pursuant to petitioner's timely motions, the mandate of the court of appeals was stayed until May 2, 1969 (App. E, *infra*, pp. 73-76), the date to which Chief Justice Earl Warren extended the time for the instant petition to be filed (App. F, *infra*, p. 77).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the National Labor Relations Board and the court of appeals may find an employer who clearly has bargained in good faith to be in violation of Section 8(a)(5) of the Act solely because he pleads inability to meet a union's wage demands and remain competitive and thereafter refuses the union's request to furnish certain financial data in support of said position, and (2) Whether the National Labor Relations Board and the court of appeals may hold that where unfair labor practice strikers are reinstated under business conditions requiring a work force including all strikers, non-strikers and strike replacements an employer must discriminate against non-strikers and strike replacements in a subsequent legal lay off by laying them off first and affording the returning strikers a preferential right to retention regardless of the employer's unquestionably legal method of selecting employees for lay off.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et. seq.*), are set forth in Appendix G, *infra*, pp. 79-80.

STATEMENT OF THE CASE

Petitioner, a division of The Stanley Works, is licensed to do business in Florida where it engages in the manufacture, sale and distribution of window products (App. B, *infra*, p. 31).[1]

Petitioner has had a long and peaceful collective bargaining relationship with the union[2] which resulted in labor contracts in 1961, 1962 and 1963 (App. B, p. 33; R. 37). The last contract was due to expire on January 30, 1965, accordingly petitioner and the union commmenced negotiating a new agreement on October 19, 1964 (App. B, p. 14, 33, 54; R. 37-38).

Between October 19, 1964, and January 30, 1965, petitioner and the union met and negotiated on six different occasions (App. B, pp. 14-17; R. 38-55). During this period, and at all times thereafter, petitioner offered to meet, confer and bargain with the union at any time it wished to discuss "anything the union wanted to discuss" (App. B, p. 62-63).

---

[1] "R" references are to the Joint Appendix which comprised the record in the court of appeals and which has been certified and filed with this Court. "G.C. Exh," and "P Exh." references are to the exhibits of General Counsel and Petitioner, respectively, all of which are contained in the Joint Appendix. "App." references are to the appendices which have been separately presented in accord with Rule 23(1)(i) of this Court's rules.

[2] "Union" references are to the United Steelworkers of America, AFL-CIO, Local 5571, while "Board" references are to the National Labor Relations Board.

During these negotiations petitioner agreed to increase the insurance rate under the contract to $16.00 per day (R. 46, 47); to change the time limits under the grievance procedure (R. 46); to give vacations of two and one half weeks after ten years of service and three weeks after fifteen years of service (R. 47); to supply the union with a revised seniority list every four months (R. 47); to give a two percent across the board wage increase, which was later increased to four cents per hour (R. 49, 52); to pay the higher rate to employees with two days of accumulated experience on a job upon reassignment to that same job (R. 50); to pay time and one half for Saturday work twice each year (R. 53); to release employees called for jury duty (R. 53); to give three days of bereavement pay (R. 53); to match the holidays the union was able to negotiate with Air Control (a competitor in the industry and area) (R. 54); to give blanket coverage of the Stanley Works pension plan (R. 54); and, to increase hospitalization insurance to $18.00 per day for room and board (R. 54). Petitioner offered numerous other beneficial changes in the contract such as increased hospital fees, diagnostic and x-rays fees, a radiation therapy fee and certain wage increases for day-work employees and employees who complete their probationary period (G.C. Exh. 22, R. 134-135).[3]

In the course of negotiations, petitioner was found to have taken the position that it was unable to pay more than it was offering in terms of wages and remain com-

[3]Comparing these agreements and offers with the list of proposals made by the union (G.C. Exh. 21; R. 132) it is clear that virtually all major topics except wages were agreed to or dropped by the union prior to January 30, 1965 (R. 51, 54).

petitive[4] (App. A, p. 5; App. B, pp. 17-19) Upon the union's request, petitioner supplied the union with the financial statements of the parent company for the last five years as well as other bargaining information; however, petitioner did not comply with the union's request for a financial breakdown for petitioner's North Miami division, giving as its reasons that such a breakdown was unavailable to petitioner's negotiator and it was not the company's policy to make such information available (App. A, p. 4; App. B, p. 15; R. 45, 63-64, 82).

No final agreement had been reached by the contract termination date, thus on January 30, 1965, the union membership voted 71 to 65 to strike petitioner (App. B, p. 19-20, 41-42; R. 55-56, 67- 68).

The strike commenced January 31, 1965, and continued until March 30, 1965, when the union offered to end the strike and return all strikers to work (App. B, p. 32, 52-53; R. 8, 9, G.C. Exh. 6). Prior to the union's offer, petitioner had permanently replaced all strikers (App. B, p. 47; R. 77). On April 5, 1965, petitioner replied that it was willing to reinstate all strikers with the exception of 49 whom petitioner claimed had been permanently replaced as economic strikers[5] (App. B, p. 52; G.C. Exch. 7).

[4]Throughout this case, petitioner has taken the position that it at no time pleaded inability to meet the union's demands and remain competitive but took the legally acceptable position that it was unwilling to pay more than its competition in the industry and area. The Board's trial examiner specifically agreed and found that petitioner had no obligation to supply any of the financial data requested by the union (App. B, p. 58-61). Should the instant petition be granted petitioner intends to argue that no inability to pay plea was ever made.

[5]Although petitioner initially refused to reinstate the 49 employees enumerated in its April 5th letter to the union because of their strike misconduct, it abandoned this claim and relied solely on the defense that the 49 had been permanently replaced as economic strikers (G.C. Exh. No. 7; App. A, p. 8, note 4; App. B, p. 20, note 7).

Within a few days after the union's March 30th offer, petitioner did reinstate all strikers except the 49 enumerated in its April 5th letter (App. B, p. 52; R. 8, 77). At that time, increased customer orders and the institution of a second shift necessitated the retention of all 105 returning strikers as well as all non-strikers and strike replacements (App. B, 20, note 9, 53; R. 77-81).

Upon instructions from the parent company, petitioner, on May 1 and thereafter, laid off a number of employees, including several returning strikers and a number of non-strikers and strike replacements (App. B, p. 53; R. 77-81). Employees were selected for lay off based strictly on their foreman's assesment of their ability regardless of whether they were strikers, non-strikers, new employees (replacements), or old employees[6] (R. 77-78).

After January 31st, petitoner and the union continued to meet and negotiate with the assistance of the Federal Mediation and Conciliation Service, however, no final agreement was reached (App. B, p. 48-52; R. 57-62).

---

[6]No contention was made that petitioner's selection of strikers for lay off was discriminatory independent of the strikers' status as unfair labor practice strikers (App. B, p. 53, note 7; R. 81).

FINDINGS AND DECISIONS OF THE TRIAL EXAMINER, BOARD AND COURT OF APPEALS.

In addition to finding that petitioner did not plead inability to meet the union's wage demands and remain competitive, the trial examiner reviewed the negotiations in their entirety. Applying this Courts decision in *Truitt Mfg. Co. v. NLRB*, 351 U.S. 149, the examiner held that even if petitioner did plead poverty in response to the union's wage demands and thereafter failed to adequately substantiate its plea that in light of its obvious overall good faith petitioner met its statutory obligation[7] (App. B, pp. 61-63).

Disagreeing, the Board held that petitioner claimed inability to pay more than it was offering and remain competitive. Accordingly, the Board held that petitioner's rejection of the union's demand that it supply certain financial data to support its poverty plea contributed to a stalemate in negotiations and, consequently, violated Section 8(a)(5) of the Act (App. B, p. 18-19).

Neither the Board nor the court of appeals considered the overall negotiations nor did they rule on, consider or disturb the examiner's finding of petitioner's overall good faith. Both held, in effect, that regardless of petitioner's otherwise unquestioned good faith bargaining, its failure to substantiate its poverty plea *per se* violated Section

[7]Relying on these findings and his additional finding that even if petitioner did plea poverty there was no casual relationship between the plea and the union's January, 1965, strike (App. B, p. 57-58, 63). the examiner found the strike to be economic from its inception (App. B, p. 63; R. 164-165). Inasmuch as all strikers had been permanently replaced prior to any unconditional offer to return, the examiner dismissed General Counsel's complaint that petitioner was obligated to return all unreinstated strikers. (App. B, p. 65). If the instant petition is granted petitioner intends to argue that there was no casual connection between the union's strike and what the Board found to be a poverty plea.

8(a)(5) (App. A, p. 3-5; App. B, p. 18-19). The Court enforced the Board's Order that petitioner furnish the information sought by the union (App. A, p. 10).

Accordingly, the Board and the court of appeals found that the February 1965 strike was an unfair labor practice strike from its inception and that petitioner was obligated to offer reinstatement to all strikers who had not previously been offered reinstatement (App. A, p. 6-9; App. B, p. 19-20).

Although neither the Board nor the court of appeals disturbed the examiner's findings that: (1) petitioner reemployed 105 strikers within a few days after the union's March 30th letter, (2) at that time petitioner's business necessitated the retention of all 105 strikers as well as all strike replacements and non-strikers and, (3) there was no independent evidence that petitioner's selection of employees for lay off was discriminatory (App. B, p. 52-53); both held that petitioner violated Section 8(a)(3) of the Act, when on May 1, 1965, and thereafter, it included some 12 to 15 returning strikers among a number of non-strikers and strike replacements laid off. (App. A, p. 8-9; App. B, p. 20). Ignoring the examiner's undisputed findings, the Board and the court's holding was based on the Board's finding that the lay off was caused by a labor surplus resulting from petitioner's failure to discharge strike replacements and petitioner's failure to establish that the lay offs on May 1st, and thereafter, were due to a decline in business (App. A, p. 8; App. B, p. 20, note 9). The Court enforced the Board's Order that petitioner offer reinstatement to those returning strikers who were subsequently laid off (App. A, p. 10).[8]

[8]The court of appeals noted that the Board concluded that the laid off strikers were denied reinstatement rights (App. A, p. 8, note 2), however, nowhere in the Board's decision is such a conclusion expressed.

REASONS FOR GRANTING THE WRIT

Issue 1:

1. The Board and the court of appeals misapplied this Court's decision in *Truitt Mfg. Co. v. NLRB*, 351 U.S. 149. In *Truitt* the Board found that the mere fact that an employer seeks to justify its refusal to grant a wage increase upon an economic basis and fails to submit reasonable proof of its economic situation *in and of itself* violates the employer's duty to bargain in good faith.[9]

This Court, reversing the Fourth Circuit's refusal to enforce the Board's order,[10] established the principle that while the Board may consider an employer's refusal to attempt to substantiate a claim of inability to pay increased wages in determining whether the obligation to bargain in good faith has been met:

> "We do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn on its particular facts. (footnote omitted). The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain has been met." *Supra* at 153-154.

Thus, while upholding the Board's finding of a violation "*under the facts and circumstances*", this Court rejected the Board's application of a *per se* rule. Implicit in

---

[9] *Truitt Mfg. Co.*, 110 NLRB 856 (1954).
[10] *NLRB v. Truitt Mfg. Co.*, 224 F.2d 869, (4th Cir. 1965).

the Court's decision is the principle in cases of this nature that the issue of an employer's overall, subjective good faith must be met and decided.[11] Courts of appeals and the Board have recognized the necessity of finding subjective good faith or bad faith in such cases *Western Wirebound Box Co. v. NLRB*, 356 F.2d 88 (9th Cir. 1966); *NLRB v. Movie Star Inc.*, 361 F.2d 346 (5th Cir. 1966); *Metlox Mfg. Co.*, 153 NLRB No. 124 (1965);[12] and in similar wage information cases. *NLRB v. F. W. Woolworth Co.*, 352 U.S. 938; *NLRB v. Arkansas Rice Growers*, 400 F.2d 567 (8th Cir. 1968); *Dierks Forest*, 148 NLRB 923 (1964).

Indeed it is generally recognized, except in certain very specific situations,[13] that in every case where an em-

[11]Particularly is this true in light of the majority's holding that an employer's plea *may be considered as a factor in determining an employer's good faith* and the statement of Justice Frankfurter in the concurring and dissenting opinion that:

> "Since the Board applied the wrong standard here, by ruling that *Truitt's* failure to supply financial information to the Union constituted *per se* a refusal to bargain in good faith, the case should be returned to the Board." *Supra* at 157.

[12]It is difficult to comprehend the Board's action in the instant case in light of its holding in *Metlox Mfg. Co.*, 153 NLRB No. 124 (1965) where it held:

> "But, for a review or study of an employer's financial record and related files, the Board and the courts have limited a Union's view of these records and files to situations where the employer pleads an inability to pay a wage increase, *and in these situations, as always, the prime consideration is not the bear refusal to furnish data, but whether under the circumstances in a case, the employer by his conduct is doing violence to the principles of good faith bargaining.*" *Supra* at 1394. (Emphasis supplied)

[13]Thus a *per se* violation of section 8 (a) (5) may be found where an employer: (A) refuses to reduce agreements to writing; (B) fails to bargain about a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736; (C) adamently insists upon the inclusion of a voluntary subject of bargaining in any agrement. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 353 U.S. 907; or, (D) proposes the inclusion of an illegal subject for bargaining. *Local 357, Teamsters v. NLRB*, 365 U.S. 667; *NLRB v. News Syndicate Co.*, 365 U.S. 695.

ployer who has met and bargained with a union has been charged with bad faith bargaining the issue of good faith must be considered and decided on the basis of the employer's state of mind and intention as reflected by the totality of his conduct. *NLRB v. American Ins. Co.* 343 U.S. 395, 409-410; *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953) *cert. denied* 346 U.S. 887.[14]

> "It . . . [is] the responsibility of the Trial Examiner and the Board to glean the state of mind of the agents of the Company from an examination of all the surrounding circumstances." *United Steelworkers, supra* at 852 and cases cited in footnote 12.

While the trial examiner fulfilled his responsibility in the instant case, it is clear that neither the Board nor the court of appeals even considered the issue or petitioner's overall good faith. In fact, it is patent that both found an inability to pay plea and automatically concluded that petitioner had violated the Act. No other conclusion may be supported from the record in light of petitioner's undenied willingness to meet and confer with the union at any time on any matter; the agreements, concessions and proposals made by petitioner; and, petitioner's long and peaceful bargaining history with the union. Without a doubt, but for the Board's finding of petitioner's failure to adequately support an inability to pay plea the Board and the court would have found petitioner's bargaining the quintessence of good faith as all other significant issues were settled before the strike.

---

[14]See also *NLRB v. Ins. Agents' Int'l. Union*, 361 U.S. 477, 498 (1960); *NLRB v. Texas Coca-Cola Bottling Co.*, 365 F.2d 321, 322 (5th Cir. 1966); *United Steelworkers of America, AFL-CIO v. NLRB*, 390 F.2d 846, 849-852 (D.C. Cir. 1967) (dictum), *cert. denied* 391 U.S. 904.

Thus, failing to consider the totality of petitioner's conduct and reach the issue of petitioner's overall good faith, the Board and the court of appeals have applied a *per se* rule in direct contradiction of the test established in *Truitt* and the language of the statute.[15]

2. There is a conflict among the courts of appeals for the various circuits as to the meaning and appropriate application of the Court's decision in *Truitt*. Given a situation where an employer has refused to comply with a union's request that it substantiate a plea of inability to pay the union's wages or other economic demands and remain competitive, the circuit courts are at odds as to the meaning and the application of *Truitt*. Thus, it appears that at least the First, Fifth and Ninth Circuits consider and make a finding as to the employer's overall, subjective good faith based on the employer's intention as reflected by the totality of his bargaining conduct,[16] while the Third, Seventh and District of Columbia Circuits appear to disregard the employer's subjective good faith and automatically find a violation of the employer's bargaining duty.[17] Petitioner respectfully submits that the Court should grant its writ and settle the conflict.

---

[15]Section 8(d) (App. G, p. 79-80).

[16]*Sylvania Electric Products Inc. v. NLRB*, 291 F.2d 128, 132 (1st Cir. 1961); *NLRB v. Western Wirebound Box Co.*, 356 F.2d 88, 91 (9th Cir. 1966); *NLRB v. Movie Star Inc.*, 361 F.2d 346, 350 (5th Cir. 1966); *Metlox Mfg. Co. v. NLRB*, F.2d 64 LRRM 2350 (9th Cir. 1967).

[17]*United Fireproof Warehouse Co. v. NLRB*, 356 F.2d 494, 498 (7th Cr. 1966) (dictum); *I.T.&T. Corp. v. NLRB*, 382 F.2d 366, 371-372 (3rd Cir. 1967); *United Steelworkers of America, AFL-CIO, Local 5571 v. NLRB*, 401 F.2d 434 (D.C. Cir. 1968).

3. If the decision is allowed to stand, it will interfere with the purposes and policies of the Act. The Congressional policy underlying the Act is unquestionally to encourage and foster the practice and procedure of the collective bargaining.[18]

To further define the declared National policy, Congress enacted Section 8 (d) of the Act with the purpose of assuring the parties to a proposed collective bargaining agreement the greatest degree of freedom possible in their negotiations and to prevent the Board from controlling and settling the substantial terms of collective bargaining agreements.[19] *NLRB v. Ins. Agent's Union, supra; NLRB v. American Ins. Co., supra.*

Clearly, consistency with Congressional intent demands the avoidance of enunciating and/or applying *per*

---

[18]"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . . by encouraging the practice and procedure of collective bargaining. . . . .". 29 U.S.C. 151.

[19]"**** [T]he present Board has gone very far, in the guise of determining whether or not empoyers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make **** [discussion of Board cases].

"These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements." H.R. Rep. No. 245, 80th Cong., 1st Sess. 7.

"****The Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining the merits of the positions of the parties." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34.

se rules, not specifically required or allowed by the statute,[20] which would have the effect of regulating the bargaining process in its substantial aspects and predetermining good faith by objective standards.

Here the Board, with court approval, has established a *per se* rule which it will apply automatically and universally to determine the merits of an employer's position regardless of his otherwise unquestional good faith. Doubtless, if the instant decision is allowed to stand its future application will severly restrict the freedom in negotiations intended for the parties by the enactment of Section 8(d). In fact, failure to overturn the decision could lead to an interpretation of Court approval of a return to the dangerous trend of the "Board sitting in judgment" which Section 8(d) was enacted to curtail.

As was the situation here,[21] the normal course of collective bargaining involves employer representatives not trained in the niceties of labor law but who are employed internally and additionally assigned the task of working out an acceptable agreement with the union. This is as it should be, for the design of the statute is to make the collective bargaining process as simple and uncomplicated as possible so that it will become a part of an employer's normal business operation.

The instant decision expands the definition of employer conduct which will be deemed *per se* to violate Section 8 (a) (5). The effect of such an expansion, particularly as in this case where a technical, legal question

---

[20]See footnote 13, *supra* at 10.

[21]Robert F. Burger, Division Plant Manager, represented Petitioner in the negotiations with the union (R. 38, 71).

is involved, would clearly encumber the bargaining process by requiring even the smallest employer faced with an obligation to bargain to hire not only a lawyer, but an expert in labor relations, to represent him.[22] To do otherwise would subject a negotiating employer to being helplessly maneuvered into technical corners by trained union negotiators and found in violation of the law, or at least of having to baragain under circumstances of legal uncertainty, regardless of his good faith intentions. Further, to allow this attempted expansion of the *per se* scheme would necessarily inject an element of formality and regimentation into the collective bargaining process which would not only remove bargaining from the management function and place it in the hands of disinterested experts but also make collective bargaining a veritable jungle of technical, absolute rules.

Thus, it is Petitioner's belief that by allowing the instant decision to stand the Court would encourage the establishment of *per se* rules in the bargaining process which could not help but make the process more cumbersome, difficult and expensive. Additionally, it would give employers, particularly in small operations, an added incentive to fight unionization in order to avoid the expensive and technical obligation to bargain in "good faith".

[22]Undoubtedly a majority of the employers who are or will become obligated to bargain with a union cannot afford this expense.

Issue 2:

1. The instant decision discriminates against non-strikers and strike replacements in violation of Section 7 of the Act.[23] The effect of the decision herein is to shield returning unfair labor practice strikers from lay off in the future at the expense of non-strikers and strike replacements. Thus, instead of returning to petitioner's work force just as if the strike had never occurred, in which case there is no doubt that the lay offs in question would have been legal,[24] the unfair labor practice strikers in this case have been given preferred treatment because, and only because, they participated in the union's February 1965 strike.

This conclusion is inescapable as at the time the strikers were returned to work (within a few days of March 30th) petitioner's increased business required a work force including all returning strikers as well as all strike replacements and non-strikers. Therefore, the replacements lost their status as strike replacements and simply became members of the large work force which included non-strikers and returning strikers. This expanded work force continued to work without substantial

---

[23]"Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." 29 U.S.C. 157. (Emphasis supplied)

[24]This is true as there is no contention nor finding that petitioner's selection of employees was discriminatory independent of their status as unfair labor practice strikers. See *supra*, note 6.

change for well over a month,[25] and then a lay off became necessary.[26]

Petitioner respectfully submits that once the strikers returned and became a part of and integrated into the larger work force necessitated by petitioner's increased business they were entitled to no more protection from lay off than the other members of the work force and were entitled to no more favored consideration than if the strike had never occurred. Assuming there had never been a strike, it is clear that the strikers could lawfully have been considered for layoff on a basis of equality with all other members on the work force.[27] Thus, just as if the strike had never occurred, petitioner considered all employees, including strikers, for lay off and applied a uniform test in selecting which employees to lay off. To have done otherwise would have violated the Section 7 rights of the employees who elected not to participate in the strike.

The Board's ruling clearly abrogates the Section 7 rights of non-strikers by directing petitioner to afford the returning strikers' preferential treatment over non-strikers

---

[25]Although the decision indicates that lay offs occurred as early as May 1st, a review of the record indicates that there is no claim that any of the returning strikers were laid off before May 14, 1965 (R. 10-12)

[26]The Board and the court of appeals found that the lay off was caused by the swollen work force resulting from petitioner's failure to discharge strike replacements at the time the 105 strikers were reinstated (App. A, p. 8; App. B, p. 20, note 9); however, this finding is clearly without any support as it is uncontradicted that at the time petitioner reinstated the strikers the increased business and institution of a second shift required the retention of all replacements, non-strikers and returning unfair labor practice strikers.

[27]App. B. p. 53, note 7.

and replacements in consideration for a lay off.[28] To uphold the Board's decision would establish a rule of law requiring employers to treat strike replacements and non-strikers as second class workers since it clearly requires that they be laid off ahead of returned strikers regardless of any other consideration.

Clearly, such an order is in direct conflict with and substantially interferes with the non-striking and replacement employees' right to refrain from engaging in protected, concerted activity under Section 7 of the Act.

2. The instant decision violates the rights of non-strikers and strike replacements to liberty and property contrary to the due process clause of the Fifth Amendment,[29] which clause applies to the actions and decisions of the National Labor Relations Board. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Local 74 United Broth. of Carpenters & Joiners of America, A. F. of L.*, 181 F.2d 126 (5th Cir. 1950) *aff'd.* 341 U.S. 707; *NLRB v. Washington Virginia & Maryland Coach Co.*, 85 F.2d 990 (4th Cir. 1936), *aff'd.* 301 U.S. 142.

---

[28]The Board's Order, which was approved by the court of appeals, directed petitioner to discharge, if necessary, strike replacement in order to make room for returned strikers who were subsequently laid off (App. A, p. 10; App. B, pp. 21, 24).

[29]The Fifth Amendment reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amendment V.

Although the Fifth Amendment contains no equal protection clause and provides no specific guarantee against discriminatory action by Federal administrative agencies, *Hirabayashi v. United States*, 320 U.S. 81, it does protect persons against discrimination that is so arbitrary and injurious as to violate the due process clause. *Hirabayashi, supra; Detroit Bank v. United States*, 317 U.S. 329; *Emploing Lithographers of Greater Miami, Florida v. NLRB*, 301 F.2d 20 (5th Cir. 1962). Further, this Court has recognized that numerous employee rights not only constitute liberty but also property protected by the due process clause. *Adair v. United States*, 208 U.S. 161; *Local 74, United Broth. Carpenters, supra* at 132; *Texas & P. Ry. Co. v. Broth. of R. Trainmen*, 63 F. Supp. 640, 644 (D.C. La. 1945) reversed on other grounds 159 F.2d 822 (5th Cir. 1947) *cert. denied* 332 U.S. 760; *Ellis v. United States* 206 U.S. 246.

Petitioner contends that the right of its non-striking and replacement employees to refrain from the activities guaranteed by Section 7 of the Act is a right to liberty and property protected by the due process clause. Clearly, the instant decision requiring petitioner to discharge them, if necessary, in order to reinstate laid off strikers is so inherently arbitrary and discriminatory as to deny petitioner's non-striking and replacement employees their rights to liberty and property without due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

GLENN L. GREENE, JR.

W. REYNOLDS ALLEN

Attorneys for Petitioner
Suite 602
1201 Brickell Avenue
Miami, Florida 33131

CERTIFICATE OF SERVICE

The undersigned certifies that a printed copy of the foregoing Petition for Writ of Certiorari and Appendices thereto has this day been served by air mail first class, return receipt requested, on the following counsel at the addresses listed below:

Marcel Mallet Prevost
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Bredhoff & Gottesman
Attorneys for United Steel Workers of America
AFL-CIO Local 5571
Att: Michael H. Gottesman, Esq.
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

The Solicitor General
Department of Justice
Washington, D. C.

Glenn L. Greene, Jr.

Dated at Miami, Florida this day of , 1969.

SUPREME COURT, U. S.

MAY 2 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

Term

No. 1347

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDICES A - G

GLENN L. GREENE JR.
W. REYNOLDS ALLEN
Attorneys for Respondent

Office of Glenn L. Greene, Jr.
Suite 602
The Mutual of Omaha Building
1201 Brickell Ave.
Miami, Fla. 33131

MIAMI REVIEW — 371-4825 — 377-3721

INDEX

	Page
APPENDIX "A"	App. 2
APPENDIX "B"	App. 11
APPENDIX "C"	App. 67
APPENDIX "D"	App. 71
APPENDIX "E"	App. 73
APPENDIX "F"	App. 77
APPENDIX "G"	App. 79

in the
Supreme Court
of the
United States

Term

No. _____

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDICES A - G

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,193

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Intervenor

No. 21,343

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571,

Intervenor

On Petitions for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board

---

Decided September 3, 1968

Mr. George H. Cohen, with whom *Messrs. Elliot Bredhoff* and *Michael H. Gottesman* were on the brief, for petitioner in No. 21, 193 and intervenor in No. 21,343.

Mr. Glenn L. Greene, Jr., with whom *Mr. W. Reynolds Allen* was on the brief, for petitioner in No. 21,343 and intervenor in No. 21,193.

Mr. Elliott Moore, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Thomas S. Smith*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before BASTIAN, *Senior Circuit Judge*, and BURGER and McGOWAN, *Circuit Judges*.

BURGER, *Circuit Judge:* Both the Union and the Company petition for review of a finding by the National Labor Relations Board that the Company violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (a)(5) (1964), by failing to furnish requested economic data to the Union, and violated sections 8(a)(1) and 8(a)(3), 29 U.S.C. §§ 158(a)(1), (a)(3) (1964), by refusing to grant immediate and full reinstatement to striking workers.

The Company first argues that it was not under a duty to produce its financial statements because there was no claim of financial inability to pay. Twice during the period of collective bargaining the Company wrote directly to its employees. The first letter stated:

> Our sales have increased very substantially as you well know from the many hours of overtime and the many new employees. Each of you, who work on an hourly basis, have had a larger take-home pay than ever before.
>
> However, increased sales do not necessarily mean increased profits or earnings. Earnings are what is left after expenses are paid. Unfortunately, our cost of doing business has increased alarmingly, resulting in earnings not in proportion to our sales increases. Material costs have increased and we have also spent large sums in improving our working conditions by bringing the property and equipment to a better appearance and operating condition.

Later, the Company wrote:

> To give you a little background, you will recall in previous letters I had mentioned to you that 1964 had been a very trying and difficult year. Even though our sales were higher, our earnings were considerably less than the year before.

In response to the Union's initial request for the Company's financial statements, made after the first letter to the Company's employees, the Company furnished the statements of its parent company, but not of the division with which the Union was bargaining. The Company told the Union that it was not the policy of the parent company to release such information. However, the Company negotiator later stated that although the parent was making money, the division was not, and the division had to stand

on its own. When the Union made its wage proposals, the Company's negotiator responded, according to his own testimony, that "if we gave any more, at this time, I didn't see how we could remain competitive." The Board concluded that the Company throughout relied upon its inability to afford the economic demands and that its position had, by the end of the negotiations, "crystallized into a claim of inability to pay more than it was offering and remain competitive." We agree that the contention that the division had to "stand on its own" and that it could not remain competitive if it granted Union demands put ability to pay in issue.

If a claim of inability to pay "is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Not only was the claim that profits were not proportionate to increased sales apparently made to the Union here, but the Company also took its case directly to the workers—the ultimate arbiters of contract proposals. When the final wage offers were exchanged, the Company returned to its claim that the money to pay for the Union's proposal just wasn't there.[1]

---

[1]The Company also claims that, even if it did assert an inability to pay for the increased economic benefits, the Union had not previously asked for a *wage* increase. However, the first Company letter to the employees came after the Union had initiated the bargaining with a series of *economic* demands. 166 N.L.R.B. No. 110 at —. Moreover, when the Union first presented its specific wage demands, the Company negotiator, by his own admission, responded that the Company could not meet these demands and still remain competitive. The Union thereafter again requested the financial statements and they were not provided. Even on the Company's reading of *Truitt*, then, the record shows a wage demand, followed by a claim of inability to pay, and then a refusal to furnish supporting economic data requested by the Union.

The Company asserts that a claim of inability to pay is not shown when the Company merely claims that the increases will prevent it from competing. But the inability to compete is merely the explanation of the reason why the Company could not afford an economic benefit. In *Truitt*, for instance, the case from which the short-hand expression "inability to pay" is derived, the employer's claim was that "an increase of more than 2½ cents per hour would put it out of business." 351 U.S. at 150. Claims of the need to remain "competitive" have been equated to claims of inability to pay for the purposes of creating an obligation to provide supporting economic data. *E.g.*, *International Tel. & Tel.* v. *NLRB*, 832 F.2d 366, 370-71 (3d Cir. 1967); *NLRB* v. *Celotex Corp.*, 364 F.2d 552 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966); *NLRB* v. *Western Wirebound Box Co.*, 356 F.2d 88, 91 (9th Cir. 1966).

The Company's second challenge to the Board's order is that, even if it did violate section 8(a)(5) by failing to furnish the requested financial statements, the subsequent strike was nevertheless an economic strike, and not an unfair labor practice strike. The significance of this contention is that only if the strike were an unfair labor practice strike could the Board order reinstatement and back pay for certain strikers for whom replacements were hired. *See Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956).

The Company urges that the strike was an economic strike because its motive was to exact a larger wage settlement. But the existence of economic motives for a strike does not preclude its being an unfair labor practice strike. *See NLRB v. My Store, Inc.*, 345 F.2d 494 (7th Cir.

1965); *NLRB* v. *Southland Cork Co.*, 342 F.2d 702 (4th Cir. 1965); *General Drivers Local 662* v. *NLRB*, 112 U.S. App.D.C. 323, 302 F.2d 908 (1962); *NLRB* v. *Fitzgerald Mills Corp.*, 313 F.2d 260, 269 (2d Cir. 1963). The question is whether the unfair labor practice was a "principal cause of the strike." *NLRB* v. *Southern Cork Co.*, *supra* at 707.

The negotiations between the Company and the Union had reached a stalemate on only one issue—wages. The record here reveals that the Company had represented to the Union—and had informed the employees directly—that its operations were not producing a return that would justify the requested wage increase. In response, the Union requested access to the Company's financial information so that it could adequately evaluate the feasibility of pursuing their wage demand. The Company refused, and the employees were informed of this fact among others by their negotiator when he reported to the employees before they acted on the proposals and voted to strike. The company action of refusing to submit financial data was found by the Board to constitute an unfair labor practice, as representing tactics which disrupted the bargaining session to the point of impasse. Thereafter, the employees rejected the Company's offer and voted to strike. The Board concluded that the wage stalemate led to the strike and that the failure to furnish financial information brought on this stalemate. Our review, limited to whether there is record support for this conclusion, leads us to conclude we are bound to affirm the Board's action.

The Company also challenges the Board's order because the record lacks specific evidence as to which workers were denied reinstatement, and which were reinstated and

then discharged.[2] Because of the incomplete state of the record,[3] the Board decided to defer until the compliance proceedings, the determination of such matters as which employees were entitled to reinstatement and the dates on which others were tardily offered reinstatement.[4] There is record evidence to support the finding of the Board that certain strikers were reinstated and then laid off when the swollen labor force was reduced. While there is no absolute obligation to discharge replacements when unfair labor practice strikers are reinstated, the replacements must make way for reinstated strikers. *See Mastro Plastic Corp. v. NLRB, supra.* Consequently, if an employer causes his labor force to become over-extended by retaining replacement workers, and then reduces that labor force to normal size by laying off both strikers and replacements, he has done the same violence to the rights of unfair labor practice strikers as if he denied them reinstatement. The Company here offered no evidence to support its assertion that the lay-offs were due to decline in business. Instead, testimony of Company officials shows that the reinstatement on top of retained replacements caused the Company's labor force to exceed what it would normally be at that time. Since there is record evidence to support the find-

---

[2]The Company fully replaced the striking employees and it did not discharge any of the replacements when the strikers were reinstated. However, about one month later, the parent company ordered lay-offs of part of the swollen labor force. Some of the reinstated strikers were then laid off and the Board concluded they were thereby denied their reinstatement rights.

[3]The Trial Examiner did not reach these matters because he had concluded that the strike was an economic strike.

[4]The record contains letters from the Company denying reinstatement to certain workers alleged to have engaged in strike misconduct. However, this claim was subsequently dropped by the Company; before the Board, it contended only that the strike was economic and therefore the strikers were not entitled to reinstatement.

ings of the Board as to the improper reinstatement of the unfair labor practice strikers, we find no error in deferring until the compliance stage of these proceedings a determination of which employees were entitled to what relief.

The Union challenges the Board's order for the failure to find additional section 8(a)(1) and 8(a)(5) violations. The first asserted violation was that the Company unilaterally changed working conditions, *see NLRB* v. *Katz*, 369 U.S. 736 (1962), when it provided free food and beverages for those workers who did not strike. For the first eight days of the strike the normal canteen-truck food service was not available to the workers because the regular suppliers of food service would not cross the picket lines. For this limited period, the Company paid for sandwiches and coffee brought into the plant in a private automobile. Thereafter, regular canteen-truck services were established. The Board was plainly justified in finding no unfair labor practice; this was a small matter resulting from "circumstances which the Board could or should accept as excusing or justifying unilateral action." *NLRB* v. *Katz*, *supra* at 748.

The Union also challenges the Board's dismissal of unfair labor practice charges against the Company for conditioning its bargaining on the Union's dropping pending unfair labor practice charges. *See NLRB* v. *Southland Cork Co.*, 342 F.2d 702, 706 (5th Cir. 1965); *Hartsell Mills Co.* v. *NLRB*, 111 F.2d 291, 292 (4th Cir. 1940). The only evidence that the Company so conditioned its bargaining was that a negotiator stated that he "couldn't think clearly with these charges hanging over his head." Although it was about a month between this statement and

the next bargaining session, there is no evidence here of a refusal to bargain while the charges were pending, as there was in the cited cases. *See also Solo Cup Co.* v. *NLRB*, 332 F.2d 447 (4th Cir. 1964).

The Union also challenges the Board's order for failing to require back pay for reinstated workers from the time they were replaced, rather than from the traditional time used here—the time of the offer to return to work. *E.G., NLRB* v. *Southland Cork Co., supra.* The Company, on the other hand, urges that the Board should have tolled the back-pay provisions until the date of its order. The Board entered its traditional order for this type of case. However, as this court has said before:

> The Board's power to fashion remedies places a premium upon agency expertise and experience, and the broad discretion involved is for the agency and not the court to exercise. We cannot insist that the traditional relief provided here will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law.

Amalgamated Clothing Workers v. *NLRB*, 125 U.S.App. D.C. 275, 281, 371 F.2d 740, 746 (1966). For the same reason, the Union's contentions that the order should have required the Company to mail a notice to each employee is lacking in merit.

The Company's petition for review in Case No. 21,343 and the Union's petition for review in Case No. 21,193 are denied and the Board's order will be enforced.

So ordered.

APPENDIX "B"

APPENDIX "B"

APPENDIX "B"

166 NLRB No. 110 D-107

Miami, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 12-CA-3148
12-CA-3201 (1-2)
12-CA-3343

STANLEY BUILDING SPECIALTIES CO.
a subsidiary of THE STANLEY WORKS
and
UNITED STEELWORKERS OF AMERICA
AFL-CIO, LOCAL 5571

DECISION AND ORDER

On February 28, 1966, Trial Examiner Max Rosenberg issued his Decision, attached hereto, in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs. The Respondent filed a brief in support of the Trial Examiner's Decision and an answering brief.

The National Labor Relations Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and adopts the Trial Examiner's Decision only to the extent consistent herewith.

The Trial Examiner found that the Union advanced no wage proposals prior to January 27 or 28, 1965. He concluded, therefore, that prior to those dates the Union was not entitled to the production of Respondent's financial statements, and Respondent's refusal to produce them prior to that time did not violate Section 8(a)(5). He further found that, even after the Union advanced its wage proposals, Respondent did not plead poverty but expressed concern that the wage differential between Respondent and Air Control, a competitor, endangered its competitive position, and Respondent would not offer more than a $.04 hourly rate increase until the Union forced its competitor to increase its wage scale. This "firm stand" without documentation did not constitute bad faith bargaining, according to the Trial Examiner, because it was not premised on a claim of financial inability but on its competitive position in the area. He also found that, assuming Respondent did in fact plead poverty, it, nevertheless, did not violate Section 8(a)(5) by failing to substantiate its claim because it at no time attempted to deceive the Union with respect to its financial position, and, in fact, advised the Union that it had made a small profit, always stood ready and willing at every bargaining session to meet with and discuss anything the Union wanted to discuss; and the mere failure to produce the financial statement, standing alone, is not sufficient ground for a

finding of bad faith bargaining. Finally, he found that the employees went on strike because Respondent's wage proposal was not large enough, rather than because Respondent did not produce the financial information requested, and, therefore, the strike was an economic, rather than an unfair labor practice, strike. The Trial Examiner concluded, therefore, that Respondent did not violate Section 8(a)(3) by refusing to reinstate some of the strikers, by reinstating some strikers to different jobs and shifts, and by subsequently laying off some strikers while retaining employees who had been hired as replacements during the strike.

The General Counsel and the Charging Party except to these findings, contending, in essential part, that Respondent invoked a plea of poverty shortly after negotiations began, and therefore, that a finding of an 8(a)(5) violation is not precluded by the fact that the Union's request for financial information preceded a specific wage proposal. Both parties further contend that Respondent, in effect, did plead financial inability throughout the entire course of negotiations, and that it did demonstrate bad faith when it declined to furnish the information requested. In addition, they argue that the strike was an unfair labor practice strike rather than an economic strike, that there can be no question but that the major issue separating the parties was the wage issue, and because of Respondent's refusal to furnish the requested information, the resolution of the wage issue here was made impossible. Finally, both the General Counsel and the Charging Party contend that Respondent's failure to reinstate all the strikers within a reasonable time after the Union's unconditional offer on behalf of all the strikers to return to work, the subsequent laying off of strikers,

and the assigning of returning strikers to different jobs and work shifts, violated Section 8(a)(3) of the Act. We find merit in these exceptions and contentions.

At the first bargaining session on October 19, 1964, the Union included several proposals which were clearly economic in nature — severance pay, cost of living increases, bereavement pay, overtime for Saturday work, and jury duty pay. Then, on November 23, before the next bargaining session, Respondent's general manager, Farley, wrote a letter to all employees, in which Respondent called attention to the preparation of its 1965 budget and specifically indicated that its financial position in 1964 had fallen below its hopes and expectations. Farley wrote, in pertinent part:

> However, increased sales do not necessarily mean increased profits or earnings. Earnings are what is left after expenses are paid. Unfortunately, our cost of doing business has increased alarmingly, resulting in earnings not in proportion to our sales increases.
>
> Material costs have increased and we have also spent large sums in improving our working conditions by bringing the property and equipment to a better appearance and operating condition.

At the second bargaining session on December 8, the Union, in addition to renewing its previous proposals, also submitted other economic demands — an increase in hospitalization benefits, and the payment of higher wage rates to employees who had accumulated 2 days' experience in jobs calling for such rates. It was at this meet-

ing that the Union first requested financial data from Respondent. On the following day, the Union sent a letter to Respondent in which it specifically referred to Respondent's notification to all employees of its financial position, and again requested financial information so that it would be able "to make a realistic approach to the joint problems." Although Respondent answered the Union's request for data by supplying the consolidated financial reports of the parent company, it failed to produce any financial information with regard to its own operations, stating that "it was not available and not the company's [The Stanley Works] policy to make it available."

The parties met again on January 19. At that meeting, it appears that Burger stated that "the Company as a whole is making money but we are not making money in this division, that we have to stand on our own down here and if we can't make it here, one of these days they will be closing the doors, because we have been losing money long enough." McCall immediately requested that Burger support his position with the financial information previously sought, and Burger again took the position that it wasn't the policy of the company to make the information available, and that they didn't make it available to other unions.

On January 26, Respondent wrote another letter to its employees in which it sought to explain its proposal to the Union. The letter stated, in pertinent part:

> To give you a little background, you will recall in previous letters I had mentioned to you that 1964 had been a very trying and difficult year. Even though our sales were higher, our earnings were considerably less than the year before.

> I think you have a right to know how your company can do more business and yet realize less profit. The reasons are not simple ones. One is the fact that we had a rash of price increases during the past twelve months. Our aluminum costs went up three different times and our glass cost was increased 15%.
>
> An even more important reason is to meet customer requirements for our new business, we had to increase the number of employees and work many hours overtime, which is very costly. The overtime has been reflected in each of your pay checks.
>
> The increased costs did not end with overtime and new trainees because all the contributing areas of cost in the plant went up accordingly with the increase of employment and hours.

At the January 27 or 28 meeting, according to Burger's own testimony, he told McCall that "if we [Respondent] gave any more, at this time, that I didn't see how we could remain competitive and that we felt as though we weren't refusing to give and that we could offer something and that is what we were offering."[1] On cross-examination, Burger elaborated on Respondent's bargaining position by testifying, "And so we just didn't see how we could stay in competition and be competitive if we would go in and grant another $.10 and $.08 increase

[1]This more complete quotation of Burger's testimony is at variance with the Trial Examiner's findings. The Trial Examiner found that Burger stated, in response to McCall's statement to the effect that The Stanley Works' emblem represented dollars to him, that Respondent could afford a 2 percent increase at the time and "that is what we were offering."

in the contract like Mr. McCall asked for orginally (sic), so what we did offer was what we felt or hoped that we could overcome or live with." It is undisputed that at this point McCall asked Respondent for financial data with respect to its own operations to support its position, and that Respondent again refused on the ground that the parent company would not provide any additional material.[2]

A scrutiny of the foregoing evidence, and the record as a whole, convinces us Respondent took the position after the first bargaining session that it could not afford substantial increases in wages and other benefits, and by the January 27 or 28 meeting, and thereafter, its position had crystallized into a claim of inability to pay more than it was offering and remain competitive. While we need not decide whether Respondent's refusal on or about December 10 to supply the financial data requested by the Union constituted a violation of the Act,[3] we do not read the Supreme Court's holding in *N.L.R.B.* v. *Truitt Mfg.*

---

[2]In addition, the record also shows that Respondent otherwise hid behind its financial plight in failing to consider seriously the Union's further economic demands. Thus, General Manager Farley stated in a speech to the employees on January 30, ". . . I would like to give you an increase this year, but we are going to try it and hope that we are going to make out by the one we give you next year."

We also note that even when Federal Mediator MacAllister presented the Union's reduced demands to Respondent at the February 3 bargaining session, Burger replied, "It's not there . . . " And, at the February 12 meeting, Burger stated that he "didn't see how we [Respondent] could remain competitive if we offered any more than we were offering."

[3]Rather than seeking the information in order to ascertain what the traffic would bear, as intimated by the Trial Examiner, we think the Union's earlier request for financial data was understandable, particularly in view of Respondent's apparent prosperity during the 2 years of the expiring agreement and Respondent's suggestion in its November 23 letter to the employees that the economic picture was not as bright as it appeared. We view the Union's request, therefore, as an earnest attempt to come to grips with Respondent's professed inability to meet the Union's current and anticipated demands.

Co., 351 U.S. 149, as precluding an inquiry into Respondent's conduct before negotiations have commenced or before the Union has laid its complete economic proposals on the bargaining table, where the question presented to us is whether Respondent acted in good faith in calling attention to its financial plight in order to forestall the Union's request for increased wages and other economic benefits but, at the same time, refusing to furnish requested supporting data.[4]

The ordinary case, of course, is one where the Union makes a demand for increased wages and the employer resists the demand on the ground of its inability to pay, but refuses the union's request to substantiate its claim. However, we do not believe that the Court in *Truitt* intended to restrict its holding to these simple facts; we read that case rather as announcing principles that are generally applicable to a wide variety of bargaining situations in which good faith obligations under the Act require that a party to bargaining negotiations be willing to substantiate on request a position it has taken during the course of the negotiations. We also reject the Trial Examiner's apparent basis for finding that the Union was not entitled to the production of Respondent's financial statements prior to the meeting of the parties on January 27 or 28. It is clear that *Truitt* is not limited to situations where a company refuses to substantiate its plea of inability to pay *wage* demands made by the Union. Such a limited view of the Court's decision ignores the realities of industrial relations where other economic benefits may be more coveted than wage increases during a given round of negotiations.

[4]Unlike the Trial Examiner, we do not reach that issue herein, for the record plainly shows that negotiations had begun and the Union had made economic demands on Respondent *before* it requested the financial data.

As the record shows that the Union again requested financial data at the January 27 or 28 meeting, after Respondent had claimed an inability to pay more than it was offering and remain competitive,[5] and Respondent refused to furnish the information,[6] a refusal which contributed to a stalemate in the negotiations, we find that Respondent failed to bargain in good faith in violation of Section 8(a)(5) of the Act.

We also find that the stalemate in negotiations to which Respondent's refusal to furnish information contributed resulted in the strike of January 31, 1965, and that this strike must therefore be found to have been caused and prolonged by Respondent's unfair labor practices.

In that connection we note, moreover, that at the union meeting on January 30, McCall informed the employees of the Union's request for, and Respondent's refusal to furnish, financial data. Moreover, the record shows that Respondent, both through letters and a speech, made its employes aware of its claim of inability to pay the wage increases and other benefits requested by the Union. It thus appears clear, and we find, that the employees fully understood at the union meeting, not only that the Union's request for the financial data was related to Respondent's claim of inability to pay, but that Respondent's refusal to furnish the information was tied to the stalemate in the negotiations at the bargaining ses-

[5]We find that in the circumstances of this case such a claim is, in effect, a plea of inability to pay. See, e.g., *Peerless Distributing Company*, 144 NLRB 1510, 1514; *Western Wirebound Box Co.*, 145 NLRB 1539, 1544-1545; *Wheeling Pacific Company*, 151 NLRB 1192, 1224-1225.

[6]A cursory reading of Respondent's November 23 and January 26 letters to its employees, particularly those portions set forth in our Decision, discloses some of the information which Respondent, if acting in good faith, could and should have documented for the Union, but which it chose instead to divulge only to its employees in an argumentative fashion without documentation.

sion held on January 28 or 29, when the only major issue separating the parties was wages, a disagreement which resulted in the strike vote.

As unfair labor practice strikers, the striking employees were entitled to immediate and full reinstatement to their prestrike jobs and shifts when the Union on their behalf made an unconditional application for reinstatement. To fulfill its duty to these employees, Respondent was required to discharge, if necessary, any employees hired as replacements during the strike. It follows that Respondent, by failing and refusing to reinstate the strikers immediately to their former jobs and shifts, violated Section 8(a)(3) and (1).[7] As to the strikers who were reinstated but subsequently laid off,[8] the record shows that their layoffs were directly attributable to Respondent's failure at the time it reinstated strikers, to discharge employees hired as replacements during the strike.[9] We find, therefore, that Respondent also violated Section 8(a)(3) and (1) by laying off these employees.

[7]Respondent abandoned at the hearing its claim that certain strikers were denied reinstatement because of strike misconduct.

[8]It appears from a stipulation made at the hearing that Respondent contends that employees Fred Gonzalez and Ann Molinaro were discharged for cause. As Respondent submitted no evidence to support this contention, we find that these employees were laid off for the same reason as the other employees included in this group.

[9]It appears from the record that Respondent did have an increase in business during the strike, and hired, over and above the 168 employees needed to replace the strikers, some additional employees which increased its payroll, including the 44 nonstrikers, to approximately 240 or 250 employees. With the return of a substantial number of the strikers, its payroll swelled to about 350 employees. However, Respondent introduced no evidence to support its contention that the subsequent layoff was caused by a decline in business. Indeed, the record shows that the parent company ordered Respondent to effect a layoff only after a majority of the strikers were returned to work, which increased the work force, according to Burger's testimony, "by 100 to 105 people more than what it normally would be at that time." Thus, it becomes abundantly clear that the layoff resulted from the existence of a labor surplus created by Respondent's own failure to discharge strike replacements as the strikers returned to work.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having also found that the striking employees were unfair labor practice strikers, we shall order the Respondent to reinstate, or offer immediate and full reinstatement to, all of the striking employees to their prestrike or substantially equivalent jobs and shifts with all of the rights and benefits they would have accumulated but for the discrimination against them, discharging, if necessary, any strike replacements. The Respondent shall also be required to make whole all striking employees, including those adverted to above who were laid off after reinstatement and those who were either not offered reinstatement or reinstated tardily, for any losses they may have suffered, both as a result of their layoff and/or as a result of the Company's failure to reinstate them within a reasonable period after the Union's unconditional application for reinstatement on March 30, 1965. The record does not clearly show which employees were reinstated to different jobs and shifts or those employees who may have been refused reinstatement, and the dates on which some of the employees were offered tardy reinstatement. In view of the ambiguous or incomplete state of the record in these regards, we believe it advisable that such matters be deferred to the compliance stage of this proceeding.

Any backpay due will be determined in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act, and at all times material herein has been the exclusive bargaining representative of Respondent's employees in the appropriate unit.

3. All production and maintenance employees at the Employer's North Miami, Florida, plant, including intraplant drivers, but excluding shop engineers, truckdrivers, technicians, sales personnel, office clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to bargain collectively in good faith with the Union, the Respondent has violated Section 8(a) (5) and (1) of the Act.

5. The strike which began on January 31, 1965, was caused and prolonged by the Company's unfair labor practices, and was, therefore, an unfair labor practice strike.

6. By failing to reinstate certain unfair labor practice strikers, and improperly delaying the reinstatement of others, after an unconditional application by the Union, Respondent violated Section 8(a) (3) and (1) of the Act.

7. By failing to reinstate certain unfair labor practice strikers to their prestrike or substantially equivalent positions and shifts, Respondent violated Section 8(a) (3) and (1) of the Act.

8. By subsequently laying off unfair labor practice strikers, Respondent violated Section 8(a)(3) and (1) of the Act.

9. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not violated the Act in respects not found herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Stanley Building Specialties Co., a subsidiary of The Stanley Works, Miami, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing to furnish information requested by the Union to substantiate the Respondent's claim of inability to pay the wage increases and other benefits requested by the Union.

(b) Discouraging membership in United Steelworkers of America, AFL-CIO, Local 5571, or in any other labor organization, by discriminating against strikers in regard to hire or tenure of employment or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to form labor organizations, to join or assist United Steelworkers of America, AFL-CIO, Local 5571, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Furnish the Union, on request and within a reasonable time, that information sought by the Union relating to the Company's claim of inability to pay the wage increases and other benefits requested by the Union.

(b) Offer all the strikers, including those who were reinstated but subsequently laid off, full and immediate reinstatement to their prestrike or substantially equivalent jobs with all the rights and benefits they would have accumulated but for the discrimination against them, discharging, if necessary, any replacements hired during the strike.

(c) Make whole all the striking employees, in the manner set forth in the section herein entitled "The Remedy", for any loss of pay and benefits each may have suffered by reason of the Respondent's refusal or delay in offering them reinstatement, or by reason of their subsequent layoffs.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay and other benefits due under the terms of this Order.

(e) Notify any of the striking employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(f) Post at its plant in North Miami, Florida, copies of the attached notice marked "Appendix."[10] Copies of said notice on forms provided by the Regional Director for Region 12, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 12, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. August 3, 1967.

---

[10]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words, "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

Frank W. McCulloch, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571, by refusing, upon request, to furnish that information requested by the Union relating to our claim of inability to pay wage increases and other benefits requested by the Union.

WE WILL NOT discourage membership in UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571, or in any other labor organization, by discriminating in any manner against employees because they strike or engage in any activity protected by the National Labor Relations Act.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights under the Act or in any other manner deny them such rights.

WE WILL furnish the Union, upon request and within a reasonable time, that information requested by the Union relating to our claim of inability to pay wage increases and other benefits requested by the Union.

WE WILL offer each striker, not previously reinstated to his prestrike job and shift or who was reinstated but subsequently laid off, full and immediate reinstatement to his prestrike job and shift or to a substantially equivalent job and shift with all seniority and other benefits he had accumulated before the strike and which he would have accumulated had he been reinstated upon the unconditional application of the Union, and we will make them whole for any loss they may have suffered as a result of the discrimination against them.

STANLEY BUILDING SPECIALTIES CO.,
a subsidiary of THE STANLEY WORKS
(Employer)

Dated _____ By _____
(Representative) (Title)

NOTE: We will notify any employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces

---

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 706 Federal Office Building, 500 Zack Street, Tampa, Florida 33602 (Tel. No. 228-7711, Ext. 257).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

Cases Nos. 12-CA-3148
12-CA-3201 (1-2)
12-CA-3343[1]

STANLEY BUILDING SPECIALTIES CO.
a subsidiary of THE STANLEY WORKS
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571

James L. Jeffers, Esq., of Miami, Fla., for the General Counsel.

---

[1]The amended complaint, which issued on August 13, 1965, is based on charges and amended charges in Cases Nos. 12-CA-3148 and 12-CA-3201 (1-2) which were filed on February 9, 1965, February 18, 1965, April 6, 1965, June 4, 1965, and June 17, 1965, respectively.

At the time of the hearing, a charge in Case No. 12-CA-3343 involving the same parties herein, which was filed on September 23, 1965 (and subsequently amended on October 22, 1965) was under investigation by the Board's Regional Director for the Twelfth Region. On November 8, 1965, the General Counsel filed a motion with me to consolidate Case No. 12-CA-3343 with Cases Nos. 12-CA-3148 and 12-CA-3201 (1-2) and to amend the consolidated complaint accordingly. Appended to the motion is a stipulation by and between the parties that the aforementioned Cases be consolidated and that the consolidated complaint be amended by adding the name of Julio Alzurri to paragraph 13 (a) thereof, and by adding the name of Mildred Boeger and the date of April 23, 1965 to indicate the date of Boeger's layoff and/or termination to paragraph 13 (d) of the complaint. The motion is hereby granted and the stipulation is received.

Fowler, White, Gillen, Humkey & Trenam, Esqs., by *Glenn L. Greene, Esq.*, of Miami, Fla., for the Respondent.

Emil Narick, Esq., of Pittsburgh, Pa., and *William C. McCall*, Staff Representative, of Miami, Fla., for the Charging Party.

Before: *Max Rosenberg*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This proceeding, with all parties represented, was heard before me in Miami, Florida, between September 29 and October 1, 1965, on an amended complaint of the General Counsel of the National Labor Relations Board and an amended answer of Stanley Building Specialties Co., herein called the Respondent,[2] a subsidiary of The Stanley Works. The issues posed are whether Respondent violated Section 8(a)(5), (3) and (1) of the National Labor Relations Act, as amended, by certain acts and conduct to be detailed hereinafter. At the conclusion of the hearing, the parties waived oral argument. Briefs have been filed by the General Counsel, the Respondent, and United Steelworkers of America, AFL-CIO, Local 5571, herein called the Union, which have been duly considered.

Upon the entire record in this proceeding and my observation of the witnesses, including their demeanor while on the stand, I hereby make the following:

[2]During the course of the hearing, I granted the General Counsel's unopposed motion to amend paragraph 13 (a) of the complain by adding the name of Hilda Hungerbuhler thereto, and to amend paragraph 13 (d) to correct the spelling of the name of Shirley Joyner.

Findings of Fact

I. The Respondent's business

The Stanley Works, a Connecticut corporation with home offices located in New Britain, Connecticut, operates plants throughout the United States, Canada, and Europe. Respondent, Stanley Building Specialties, Co., is a division of The Stanley Works and is licensed to do business in the State of Florida where it engages in the manufacture, sale, and distribution of window and window products at a plant located in North Miami, State of Florida. During the annual period material herein, Respondent purchased and received goods, supplies and materials valued in excess of $50,000 directly from points located outside the State of Florida. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

United Steelworkers of America, AFL-CIO, Local 5571, is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices

A. The contentions

The General Counsel contends that Respondent refused to bargain with the Union in violation of Section 8(a)(5) of the Act by (a) taking the position during collective-bargaining negotiations that it was financially unable to grant any wage increases, and by refusing to furnish financial data to support this position when pressed to do so by the Union; (b) by unilaterally changing exist-

ing conditions of employment through the provision of free food and beverages to nonstriking employees during the early stages of a strike which the Union called on January 31, 1965, a strike which the General Counsel claims was provoked by Respondent's unlawful refusal to produce the financial data requested and hence was an unfair labor practice strike at its inception; and, (c) by asserting that it would not negotiate with the Union unless and until the latter withdrew the unfair labor practices which it filed with the Board. The General Counsel also contends that Respondent violated Section 8(a)(3) of the Act by (a) failing to reinstate certain strikers upon their unconditional application for reinstatement; (b) failing to reinstate certain strikers within a reasonable period of time following their unconditional abandonment of the work stoppage; (c) laying off certain strikers who had been reinstated after their participation in the work stoppage while, at the time of the layoff, Respondent continued to employ strike replacements; and, (d) assigning returning strikers to positions and shifts different from those to which they were assigned prior to the strike. With respect to these alleged violations of Section 8(a)(3), the General Counsel concedes that the complaint as to them must fall in the event I were to find that the strike which began on January 31, 1965 was economic in nature, because all the strikers had been permanently replaced prior to their unconditional offer to return to work, because he had no independent evidence to proffer in support of his contention that the returning strikers had received disparate treatment at the hands of Respondent, and, because Respondent had engaged in no conduct following the commencement of the strike which converted the work stoppage into an unfair labor practice strike. The Respondent generally denies the commission of unfair labor practices.

B. The evidence

In July 1957, the Union was certified by the Board as the collective-bargaining representative of Respondent's employees at its North Miami, Florida, plant.[3] William C. McCall, the Union's staff representative and chief negotiator, testified that he had represented his labor organization in collective-bargaining negotiations with Respondent for many years which culminated in labor contracts in 1961, 1962, and 1963, the last of which was due to expire on January 30, 1965. According to McCall, the first meeting between the parties concerning negotiations on the latter contract was held on October 19, 1964. McCall represented the Union and Robert F. Burger, Respondent's plant manager, appeared on behalf of the Company. At this meeting, McCall verbally proposed approximately 12 changes in the existing agreement covering a broad range of topics such as changes in grievance procedures, vacation plans, severance pay, cost of living increases, bereavement pay, overtime for Saturday work, jury duty pay, the posting of seniority lists, job evaluations, safety conditions, and the production of Respondent's pension plan. Burger volunteered that he believed the current hospitalization rate was too low and that it should be revised upwards. In his testimony, McCall conceded that wages were not mentioned or discussed at this meeting.

[3]The parties stipulated that the current contractual unit of "all production and maintenance employees at the Employer's North Miami, Florida, plant, including intraplant drivers, but excluding shop engineers, truck-drivers, technicians, sales personnel, office clerical employees, guards, and supervisors" constitutes an appropriate unit for the purposes of collective bargaining.

The next session was convened on December 8, 1964. McCall again advanced his previous proposals, but also submitted additional proposals relating to the inclusion of all truck drivers in the unit, an increase in hospitalization benefits, the distribution of overtime by departments, and the payment of higher wage rates to employees who had accumulated 2 days' experience in jobs calling for such rates. Despite the fact, as McCall testified, that wages concededly had not entered into the discussion at this juncture, and that Respondent had not raised any plea of inability to pay higher wages or any other economic benefits, McCall asked Burger "for the financial statement of the company." When questioned as to why he had made this demand at this point in negotiations, McCall replied that "with this company I had met with them on several occasions in the past and found that they had always contended in the past that they had been in the red," although there is nothing in this record to indicate that McCall had ever previously demanded financial verification of Respondent's economic position. McCall then amplified this response by stating that, during a grievance meeting in November 1963 with Respondent's former plant manager, Robert Arnold, Arnold remarked that Respondent "had gotten in the black" for the first time. According to McCall, this intelligence prompted him to request a financial statement from Respondent at the meeting on December 8, 1964 because "It is pretty hard to propose anything to a company if you don't know the financial status of that company." However, McCall testified that nothing more was said of the financial statement at that time, and the discussions thereupon drifted to the Union's engagement in collective-bargaining negotiations with Air Control Products, a competitor of Respondent's in the North Miami area. McCall commented to Burger

that similar contract proposals had been presented to both Respondent and Air Control Products. McCall testified that Burger then stated that, after the Union had obtained a contract from this competitor, the Union should present it to Burger and the Respondent would match those contractual benefits, although McCall admitted that wage rates were not mentioned or included in Burger's statement.

On December 10, 1964, McCall dispatched a letter to J. C. Farley, Respondent's general manager, in which the former called attention to a letter dated November 23, 1964, which Farley had sent to the employees. McCall noted Farley's remarks that, while sales had increased substantially, earnings had not escalated proportionately. McCall remarked that "as we are entering into negotiations with your Company toward a new collective bargaining agreement on wages, hours of work, insurance and pensions, and other conditions of employment, the Union is requesting your Company to furnish the following information so that we may be able to make a realistic approach to the joint problems." The letter requested (1) "financial statements" for the past five years including 1964; (2) the cost of the pension plan at the plant; (3) the number of persons receiving benefits and the amount of the benefits paid to former employees covered by the pension plan at the installation; (4) the cost of the insurance plan now in effect, and additional costs of any proposed plan; and (5) a complete copy of the job evaluation plan in effect, including all material pertinent to the plan.

Burger replied to McCall by letter dated January 6, 1965. Attached to this letter was a copy of the consolidated financial reports of the parent Stanley Works of New

Britain, Connecticut, for the years 1959 through 1963, and a list of Respondent's employees who had received benefits under the pension plan. With respect to the cost of the pension plan covering Respondent's plant, Burger wrote that such a breakdown was impossible because "our Pension Plan is company-wide and funded through investments in insurance." Burger also stated that "The cost of the insurance plan now in effect is also difficult to give you on an individual or plant-wide basis. However, in our discussions I will be happy to go over a new proposal with you that I have additional information on." Regarding McCall's request on the job evaluation plan, Burger recited that "I believe that you have agreed that you do have a copy of all our job evaluations and descriptions which are now in effect in this plant." Burger's letter ended with a request that another early bargaining session be scheduled "so that we can bring our negotiations to a close for the coming years."

Upon receipt of Burger's letter, McCall telephoned him on January 7 or 8, 1965 to say that McCall had received "the financial statement and the pension plan of the company, but that that was not what I was asking for. That I was actually asking for the financial breakdown of [Respondent], and not the overall company." According to McCall testimony, Burger replied that "it was not available and not the company's [The Stanley Works] policy to make it available." Again, it is clear on this record, as McCall admitted, that neither he nor Burger had embarked upon any discussion as to wages at this time, and that Respondent had interposed no plea of poverty to any economic demands of the Union's.

The next negotiations were conducted on January 14, 1965. This was the first occasion on which the Union presented any written contract proposals to Respondent, and the parties proceeded to discuss them item by item. McCall testified that Burger would not agree to the Union's proposals to include all truckdrivers in the unit nor would he agree to an Agency Shop provision. However, Burger consented to the Union's proposed time limitation on the processing of grievances. With respect to wage and overtime rates, cost of living adjustments, bereavement pay, safety provisions, severance allowances, and military service provisions, the parties decided to defer these matters for later consideration. However, Burger acceded to the Union's request that Respondent furnish the Union with a seniority list every four months and a copy of the pension plan, and he volunteered to increase the hospitalization rates to $16 per day. Once more, wages were not brought into the negotiations and at no time during this meeting did Respondent plead poverty. In fact, the Union's written proposals did not contain any specific wage demands.

The parties met again on January 19, at which time Respondent advanced its proposals. Respondent agreed to the Union's request for a time limitation on the adjustment of grievances, agreed to provide an additional, paid bereavement day, agreed to furnish the Union with a seniority list every four months, agreed to increase further the hospitalization rate to $18 per day, and agreed to certain hiring rates and subsequent rate reclassifications. Respondent also proposed its vacation plan which would provide 2½ weeks' vacation after 10 years of service and 3 weeks after 15 years of service. Finally, and without any prior wage demand by the Union, Burger proposed

a 2 percent wage increase for all employees, effective January 31, 1966. McCall testified that he proceeded to read through Burger's proposals, and when he reached the section setting forth the wage increase he remarked to Burger that the latter "ought to be ashamed of himself to propose something like that to these people." Burger and his associates then withdrew from the room to caucus. When he returned, he produced a list of the wages which Respondent was then paying to the various classifications and, according to McCall's candid testimony, McCall "pointed out that they were fairly decent wages for this area." At this juncture, McCall observed a banner bearing The Stanley Works' trademark in black and gold suspended from the wall, and he remarked to Burger that "all I can see hanging from the sign is dollar bills." According to McCall, Burger replied that "the company as a whole is making money but we are not making money in this division, that we have to stand on our own down here and if we can't make it here, one of these days they will be closing the doors, because we have been losing money long enough." Shortly before the meeting broke up due to an equipment failure in the plant, McCall testified that he asked Burger to produce a "financial statement to support his position and he [Burger] said that he had discussed this with somebody in the New Britain office and that they had told him that it wasn't the policy of the company to make it available and that they didn't make it available to other unions." On cross-examination, McCall was questioned as to whether Burger, at the meeting on January 19, had stated that Respondent was paying $.30 to $.50 per hour more than most competitors in the area, such as Air Control Products, and that it would make it difficult for Respondent to remain competitive with those other companies if it granted higher wage increases. At the

outset, McCall replied, "I think Mr. Burger mentioned that about the other companies in the area. . . ." When queried as to whether Burger stated that to advance more than a 2 percent increase would destroy its competitive position, McCall then answered, "I don't recall that statement, no, he didn't." When pressed on the matter, McCall replied, "Well, I have heard that from Stanley at many, many meetings and to say definitely that that happened at any particular meeting I couldn't truthfully say because as I say I have heard it from that company so many times that I couldn't say just when it was exactly." McCall then backtracked and steadfastly insisted that no such claims had been made by Burger during "the last series of negotiation sessions," stating that, instead, Burger proclaimed the Respondent could not afford "any" wage increases either at the January 14 or 19 meeting, despite the fact that the wage topic had not arisen on January 14 and the fact that Respondent actually advanced a 2 percent wage proposal on January 19. Finally, McCall admitted that "there was a discussion about Air Control in several meetings because we were negotiating with Air Control at the same time."

The next bargaining session was held on January 27 or 28, 1965, two days before the expiration date of the existing agreement. McCall testified that he commended the parties to revert to the Union's original proposals and discuss each item seriatim. There is not the slightest suggestion in McCall's testimony that, at this point, he requested any financial statements of Respondent in order to controvert any contention by Respondent that it was unable to meet any union wage demand. At the outset, the discussion dwelt on the Union's proposal that an employee who had gained 2 days' experience on a given job

should be awarded a higher rate in the event he was permanently assigned to that classification, and the Respondent acquiesced in this proposal. Bargaining turned to the Union's request for a cost-of-living adjustment in the contract. According to McCall, Respondent "stated as they had stated earlier that they could not afford at this point to come up with that," in consequence of which McCall withdrew this proposal without ever asking Burger to substantiate his inability to pay. With respect to the Union's military pay and jury duty proposals, McCall was content with Burger's reasons for rejecting these items and they were withdrawn from the bargaining table. Next, Respondent maintained its position regarding vacation allowances. Finally, and for the first time during negotiations, McCall proposed that Respondent grant a $.10 per hour wage increase, effective January 30, 1965, and a similar increase on January 30, 1966. McCall testified that Burger then remarked, "it's not there, we can't meet it, we just can't come up with it." Whereupon, McCall and his negotiating committee withdrew from the room to discuss the matter and returned with a proposed increase of $.08 per hour in 1965 and $.07 in 1966, in addition to two more paid holidays, an enlarged vacation plan, and six sick leave days. According to McCall, Burger again responded, "it just isn't there, we just can't pay it," as a result of which McCall requested Respondent's financial statement to verify its position. Burger replied, "you got my answer on that before." So far as appears, McCall did not further press for this information and the meeting ended.

Another meeting was held the following day, either January 28 or 29. The parties once more reviewed the Union's proposals and Burger volunteered to convert Re-

spondent's 2 percent increase into a $.04 per hour increase. McCall expressed the belief that this represented no appreciable change in Respondent's earlier proposal. However, Respondent's proposed increase in bereavement pay, hospitalization rates, and Saturday overtime rates were accepted by the Union, as were other proposals dealing with non-economic matters. At the conclusion of this bargaining session, McCall informed Burger that "inasmuch as this looks like we are not in agreement nor are we going to be in agreement, that probably these people would go out on strike." Burger asked what McCall would recommend to his members, and the latter replied that he would "probably have to recommend to them to start a parade around the plant" because Respondent's offer of $.04 was "not enough." No request was made by McCall during this meeting for the production of Respondent's financial data.

Following this last meeting, McCall contacted the Federal Mediation and Conciliation Service and a session was scheduled for February 3, 1965. In the meantime, on January 30, McCall met with 136 employees in the unit to review the progress of negotiations and discuss a future course of action. McCall testified that he discussed the proposals and counter-proposals with them, and added that "I informed the people that we had asked the company for the financial statements up to this point and that they had refused to give them to us, and that this memorandum of agreement [Respondent's contract proposals] that they were proposing was all that they were proposing to the people and so I read it to them item by item and answered and discussed any questions they had with them, and then someone in the Local Union there after all of the discussion and the questions and answers were given, made a

motion to have a secret ballot on the proposal . . . ." A vote was taken but, because of some unexplained irregularity, another ballot ensued. When questioned as to the issue voted upon, McCall initially replied, "On the proposal of the memorandum agreement that the company had proposed to us and following the discussion and that they had not given us their financial data at this point after our request." McCall then related that he explained each proposed item to the assembled employees, noting that "I explained to them that in casting a ballot that first if they wanted to go on a straight proposal to put yes on their ballot and if they wanted to reject the proposal to put no on their ballot." According to McCall, he made it clear that if the employees rejected Respondent's contract proposals a strike would follow, although it does not appear from his testimony that the strike vote related to Respondent's refusal to produce any specific, identifiable wage data. Thereupon the employees voted to reject Respondent's proposals by a teller count of 71 to 65 and, on January 31, 1965, the strike commenced. When questioned as to whether the meeting of January 30 was the only one at which he informed the employees that the Respondent had failed and refused to submit financial data to support its plea of inability to meet the Union's wage demands, McCall was quick to respond, "no; no; no. I had meetings with these people where I explained almost every move that was made and explained to these people in every meeting that I was continually asking the company for the financial statements and that the company just kept refusing to give them to us. I, in fact, had had a meeting with the people on the night of January 27 where I had also explained to them the same thing." This statement is indeed curious in view of the fact that no discussion of wage rates had occurred until January 19, when Burger volun-

teered a wage figure, and no concrete wage proposal had yet been broached by McCall until January 27 or 28. Moreover, McCall testified that, if Respondent had turned over its financial records to the Union and these had demonstrated that Respondent could have afforded more money but that Respondent would not offer more than its proposed $.04 increase, McCall would nevertheless have advanced this proposal to the employees and if they accepted it they would "have a contract."

Burger's account of the events leading to the strike is as follows. Burger testified that it was customary for the plant manager to conduct negotiations on behalf of Respondent with the Union, but that final approval of any collective-bargaining agreement must come from the Director of Industrial Relations of The Stanley Works in New Britain, Connecticut, and that McCall was aware of this circumstance "for as long as he had dealt with the Stanley Works." As early as the Spring of 1964, Burger urged McCall to formulate contract proposals in advance of the January 30, 1965 expiration date of the agreement in order to resolve any potential issues which might evolve, inasmuch as Burger had embarked upon his maiden voyage as plant manager in January 1964. This suggestion was reiterated to McCall at the first formal bargaining session on October 19, 1964, at which noneconomic issues were preliminarily explored. At the meeting of December 8, 1964, both economic and non-economic topics, including increased hospitalization and vacation benefits, were perfunctorily discussed and the parties exchanged ideas on these matters, but no mention was made of any wage demands by the Union. Burger recalled that, as early as December 1964, before wages or any other economic benefits were put in issue, McCall requested that Burger

supply a copy of Respondent's pension plan and some financial statements for the last five years, as well as two or three other items, all of which information Burger procured for McCall early in January 1965 from the New Britain office. The first discussion concerning wages took place at a January meeting which, according to McCall's testimony, obviously occurred on January 19, when Respondent offered a 2 percent increase effective February 1, 1966. McCall countered with a wage proposal of $.10 per hour on February 1, 1965, and $.08 on February 1, 1966, in addition to several other items. Burger testified that he informed McCall that the latter "was a little off base asking for that much money. I said that we were already paying $.30 to $.50 more than our competitors here in the market and I thought he [McCall] would be better off first to bring our competitors up to what we were paying before he asked us for any more money." In response, McCall stated that he saw The Stanley Works' emblem on the wall and that "it means dollars to me" and that "we will take everything we can get or you have there except that [we] wanted more." Burger then remarked that "if we gave any more, at this time, that I didn't see how we could remain competitive and that we felt as though we weren't refusing to give and that we could offer something and that is what we were offering." Burger repeated in his testimony that at no time during contract negotiations did he ever refuse to discuss the subject of wage increases with McCall or indicate that Respondent was unable to afford "any" wage increases or to grant any increases over and above those proferred by Respondent. In Burger's words, "I think that at every bargaining session we ever had we always left it open and were willing to meet with him and discuss anything he wanted to discuss . . . ."

Burger's testimony is without contradiction that, on the two or three occasions when McCall asked for financial statements, and after Burger had furnished McCall with The Stanley Works' financial reports, Burger pointed out that these reports were the only documents regarding Respondent's financial position which he had ever seen during his tenure as plant manager, and McCall did not press further on this matter. Burger explained that, under the accounting procedures maintained by The Stanley Works, the only material which he collected concerned Respondent's manufacturing costs and these were transmitted to the New Britain office where they were included in one consolidated financial statement. According to Burger, McCall's main concern related to whether Respondent had made a profit "so he [McCall] would know how much money to ask for." During the entire course of his relations with McCall, Burger frankly informed McCall whenever the former had been told by his superiors that the company was operating in the black. In Burger's words, "I don't think that I ever denied that we made money at any of the meetings or at any time it came up and I think that Mr. McCall recalls and Mr. Farley the General Manager down there and all through the negotiations that he ever had with the Company that the company informed him as to whether we were making money or weren't making money." Burger went on to relate that "I don't think anybody tried to hoodwink him [McCall] as to whether we were or weren't [making money], but in the ten years that Stanley had the plant down there, there has only been two years that they did show a profit for the investment that they had down there and prior to that time they [the employees] were given substantial amounts of money in hourly increases even though the company wasn't showing a profit in this division, and the reason for that was it

was Mr. Farley's philosophy that the wages down here were too low and he wanted to make sure that the people did have more money than what our competitors offered and paid, but it had just gotten to the point where we are about $.30 to $.50 higher than what our competitors were paying."[4] Burger's testimony is undenied that, when he indicated to McCall that Respondent's wage differential was so great and that Respondent could not remain competitive if McCall's rather than Burger's wage proposals, became effective, McCall replied that "He simply . . . didn't care about all of that, and that the only thing he was interested in was this unit and the Stanley dollars, and that he wanted some of those Stanley dollars he saw in the financial statement." Burger acknowledged that he did not undertake any detailed survey of the wages which his competitors paid, stating that he had learned of the wage differentials at trade association meetings at which the competitors revealed their wage rates. Burger further testified without contradiction that he brought this fact to McCall's attention throughout the negotiations and at no time did McCall challenge or controvert Burger's assertions concerning the wage differential, and McCall never demanded Respondent's financial data to substantiate these assertions. Moreover, Burger's testimony is uncontroverted that McCall had never requested with any degree of specificity what financial data the latter sought, and never solicited any information concerning Respondent's costs. Finally, McCall in no way indicated during negotiations that the Union would precipitate a strike in the event Respondent failed to furnish financial information, and at no time after the strike commenced did Mc-

[4]Burger testified without contradiction that he informed McCall at the various bargaining sessions that Burger had learned from the New Britain office that Respondent had made a small profit in 1963 and a lesser one in 1964. However, McCall did not press Burger for these profit figures.

Call assign Respondent's failure in this regard as a reason for the work stoppage. According to Burger, "The only thing he [McCall] said about calling a strike was unless we come up with more than what we had already offered, that he was going to call a strike." Burger testified that "We stood firm on what we offered to him."

When the strike began on January 30, 1965, 212 employees encompassed in the bargaining unit were at work.[5] By stipulation of the parties, it appears that approximately 168 employees walked off the job during the first few days of the work stoppage.

It is Burger's undenied testimony, a fact which the General Counsel concedes, and a finding which I hereby make, that all of the strikers were permanently replaced on or about February 14, 1965.

At this juncture, it might be appropriate to digress for the sake of chronology in order to portray the facts as they appear against the backdrop of the allegations in the General Counsel's complaint. It is undisputed and I find that, prior to the work stoppage, Respondent utilized the services of an organization known as Tasty Catering Service to supply food and beverages to its employees for breakfast and lunch. This operation apparently consisted of a canteen truck service from which the employees purchased their needs from a truck which drew up to the plant. When the strike began, Tasty's employees refused

[5]Actually, there were 246 employees in the unit on the date of the work stoppage, of whom 34 were either on leave of absence or in layoff status. Of the 246, a total of 164 had executed checkoff cards, but 16 of these were either on leave or in layoff status, leaving a total of 148 employees who had executed checkoff cards and were employed when the strike commenced.

to cross the Union's picket line with the result that some 48 nonstriking employees went without food. Upon learning of this circumstance, Burger contacted a caterer which trades under the name of Wolfies Catering System to provide the necessary services. This caterer reported that his canteen truckdrivers might also be reluctant to cross the picket line, but, at Burger's urging, he agreed to transport sandwiches and coffee to the plant in his private automobile on an interim basis. This was done during the period from February 1 through February 8, 1965. Because these food products were not broken down individually as to price, and because Burger was unable to determine the manner in which to assess the employees for the food which they selected, Respondent decided to pick up the tab in the sum of $586.30. On and after February 8, Wolfies Catering Service dispatched its canteen trucks to Respondent's premises and sold its products directly to the employees in the same manner as Tasty had previously done. It is undisputed that Respondent did not notify the Union regarding the foregoing action.

As indicated heretofore, McCall contacted the Federal Mediation and Conciliation Service following the bargaining session on January 28 or 29, and a conciliation meeting was scheduled for February 3. A representative of the Service named MacAllister met first with the Union in an effort to arrive at a concrete and realistic contract proposal. According to McCall's testimony, the Union representatives "kicked it around for a long time, and finally we come out with the proposal that we felt might settle it and one of them was a proposal as to wages." The Union thereupon proposed a $.05 wage increase immediately and a $.04 increase in 1966, in addition to another paid holiday, an enlarged vacation plan, as well as a sick leave

plan. MacAllister conveyed these proposals to Burger and the latter replied, "It's not there, and have you got any further suggestions?" The parties were then assembled by MacAllister and Burger explained "that the money wasn't there, that they couldn't meet it, at this time, and that probably next year [Respondent] would be able to meet it." McCall remarked to Burger that "we'll give you some relief on this thing, you can't you say make it this year but possibly next year, well, give us $.08 effective July of '65 and then another $.07 in July of 1966 and that will give you the time to come up with the funds which you say you don't have right now to meet our proposal." McCall testified that Burger then made the curious comment that "it wouldn't make any difference any way, because [Burger] said you have never offered to take a wage cut in the past when we weren't making money," to which McCall replied, "you never pressed the issue." The meeting ended on this note and the Union, for the first time, filed charges against Respondent on February 9, 1965, alleging that Respondent had unlawfully refused to bargain with the Union. However, at no time during the meeting of February 3 did McCall request that Burger produce any financial data to substantiate Respondent's asserted inability to offer higher wage rates.

On February 12, the parties again met with MacAllister of the Mediation and Conciliation Service. McCall testified that he informed Burger that the Union had been in negotiations with Respondent's competitor, Air Control Products, and that it appeared that the Union and this firm would reach an agreement providing for an hourly wage increase of $.21, an additional paid holiday, and six days of paid sick leave. McCall invited Burger to match these benefits, stating that "we had talked earlier that you

had always hollered about Air Control being a competitor and that you couldn't afford to meet our proposals because of them and so we are proposing that you match the benefits that we are getting out of Air Control, and to come up with the things that they are giving us." Burger's response, according to McCall, was to accuse the latter of "cherry picking" from the Air Control Products' contract. McCall testified that, at this juncture, Burger stated that he had received the charges which the Union had filed with the Board on February 9, 1965, "and that he [Burger] couldn't think clearly with those charges hanging over his head and was asking the union to withdraw the charges." McCall replied that "we could withdraw the charges now and refile them at a later date," and a Mr. Burleson [a representative of Respondent] stated that Respondent could then refuse to bargain. However, McCall admitted that Burger did not condition future bargaining negotiations upon the withdrawal of the charges and conceded that the Respondent continued to bargain, not only after the filing of the charges on February 9, but also after the filing of subsequent charges. In this connection, it is significant to note that the complaint fails to allege that Respondent generally refused to negotiate during any specific period of time. MacAllister then proposed that Respondent reinstate the strikers and extend the recently expired contract until the Union concluded negotiations with Air Control Products, at which time Respondent could agree to include the benefits offered by that company in its contract with the Union. According to McCall's testimony, he adopted this suggestion, after which Burger and his associates held a caucus on this proposal. When it was concluded, Burger announced, "when you lift the charges filed with the National Labor Relations Board then we will bargain on the basis of the

United Steelworkers and Stanley." Again, McCall did not request at this February 12 meeting that Burger produce any financial data to assist in contract discussions. Moreover, McCall testimonially conceded that Respondent had in fact elevated its original wage offers when he stated "there have been so many proposals made but none in writing, and there were some verbal propositions proposed that possibly [Respondent] could do this."

Burger's testimony concerning the February 12 meeting recites that McCall informed the negotiators that an agreement with Air Control Products was imminent and that Burger had assured McCall that the former would "match it." Burger denied that he had given this assurance, stating that he had agreed "to go along with a comparable contract," to which McCall retorted that "the only thing [McCall] was talking about matching was money and cherry picking the economic features of it," and McCall added that "we want more money and m-o-n-e-y, that is all we are here for." Burger replied that the Union had filed unfair labor practice charges against the Respondent and that Burger could not "think very well with that hanging over my head," and suggested that McCall withdraw the charges so that "we can sit down and think about Stanley Building Specialties and the Steelworkers." McCall then observed that, even if he did drop the charges, he could refile them at a later date, and Burger agreed that this was possible. However, it is Burger's undenied testimony that he did not condition future bargaining with the Union upon the withdrawal of the charges, and that in fact Respondent continued to meet with the Union on many occasions thereafter. It is also undenied that, during contract negotiations on February 12, Burger stated that he could not conceive of how Respondent could remain

competitive if it offered "any more than we were offering," with Burger stressing that Respondent's wages were $.30 to $.50 per hour more than its competitors. In this connection, Burger pointed out that Respondent was constantly attempting to improve plant facilities in order to make it a better place in which to work, and reiterated that one of Respondent's contract proposals would considerably increase its commitment for hospitalization benefits for the employees.

The next meeting between the parties occurred on March 8, but no progress was made in settling the dispute and the strike continued. Once more, there is nothing on this record to demonstrate that the Union sought any financial data from Respondent at this meeting or suggested that the production of this material would be a condition to the resolution of the work stoppage. On March 30, McCall sent a letter to Burger in which the former made an unconditional offer on behalf of the strikers to return to their former or equivalent positions. Respondent replied by letter dated April 5 that it was willing to reinstate all strikers with the exception of an enumerated 49 who, as Respondent had indicated in the last negotiation session, had engaged in violence and misconduct during the course of the strike.[6] Burger testified without contradiction and the General Counsel has conceded that, prior to McCall's offer to end the work stoppage, Respondent had permanently replaced all the strikers. I have so found. It is also Burger's undenied testimony that Respondent reemployed approximately 105 strikers a few days after McCall's request for their reinstatement.

[6]The parties stipulated that some of these individuals were reinstated or offered reinstatement subsequent to the recall of the other strikers.

With the return of the strikers, Respondent's work force escalated to a figure of approximately 350 employees, a complement which Respondent found it necessary to maintain because customer orders had increased and a second shift had been installed. However, it is undenied that Burger was informed by the New Britain office at the end of April that it was no longer economically unfeasible to maintain such an enlarged work complement and that a layoff was dictated. Whereupon, Burger instructed his foremen to release approximately 42 employees on May 1, 1965. In doing so, Burger told his foremen to select employees for retention on the basis of their ability to perform their job assignments without regard to whether they were new employees, old employees, or former strikers. When the layoff was effected, between 12 and 15 former strikers were released. About a week later, additional employees were laid off through the use of similar separation criteria, although it is unclear on this record whether, and to what extent, additional strikers were separated by Respondent. In this connection, it should be noted that the General Counsel has offered no evidence to establish that the selection of strikers for layoff on and after May 1 was made on a discriminatory basis.[7]

Prior to the reduction in force on May 1, the Respondent recalled a certain number of strikers and assigned them to shifts other than those which they had previously worked, although these individuals did not

[7]The recently expired contract between the parties provided that "When there is an increase or decrease in the work force, the following factors shall be considered, and where factors "B" and "C" are relatively equal, length of continuous service shall govern: a. Continuous service. b. Ability to perform the work. c. Physical fitness." However, there is nothing in the record to indicate whether any of the strikers who were laid off after May 1, 1965 satisfied the foregoing criteria and that replacements who were retained did not.

suffer any reduction in pay. Some of these, however, were reassigned to their former shifts upon the Union's protest. Once again, the General Counsel has presented no evidence to demonstrate that these assignmnts were discriminatorily motivated.

It is undisputed and I find that the parties commenced negotiations on October 19, 1964, to fashion a collective-bargaining agreement to replace an existing contract which was due to expire on January 30, 1965, and various issues were preliminarily explored. Wages were neither mentioned nor discussed at this session. The next meeting was held on December 8, 1964, at which McCall verbally submitted additional proposals. Based upon McCall's testimony, I find that he requested that Burger furnish the "financial statement of the company" at this time although the Union had concededly made no wage demands upon Respondent at this juncture. McCall's request was prompted by the fact that "It is pretty hard to propose anything to a company if you don't know the financial status of that company." Negotiations then turned to a discussion of the Union's current bargaining relationship with Air Control Products, Respondent's competitor in the North Miami area.

It is uncontroverted and I find that, on December 10, 1964, McCall wrote to J. C. Farley, Respondent's general manager, and informed the latter that the Union and the Respondent "are entering into negotiations . . . toward a new collective bargaining agreement on wages, hours of work, insurance and pensions, and other conditions of employment." In his letter, McCall requested that Farley provide financial statements for the past five years "so that we may be able to make a realistic approach to the

joint problems." I find that this request by McCall was not prompted by any wage demand which the Union had made on Respondent and against which the Respondent interposed a plea of poverty. On January 6, 1965, Burger transmitted to McCall the data which the former had received from his home office, and I find that, on January 7 or 8, McCall telephoned Burger to relate that McCall was interested "in the financial breakdown of [Respondent], and not the overall company." Burger replied that these documents were the only statements of Respondent's financial position which he had ever seen, and he remarked that it was the policy of The Stanley Works not to divulge the financial condition of its divisions, although it is undenied and I find that Burger candidly informed McCall that Respondent had made a slight profit in 1963 and a smaller one in 1964. Again, McCall did not proffer a wage proposal to Burger.

On January 14, 1965, the parties held another bargaining session at which the Union submitted written proposals. I find, based upon undisputed testimony, that no wage demands were advanced by the Union at this meeting, that the proposals did not contain any specific wage figures, and that McCall did not request that Respondent expose its financial records or protest that the financial data which Respondent had already proferred was inadequate. It is uncontroverted and I find that, on January 19, 1965, Respondent submitted its "memorandum of agreement" to the Union which, in addition to including various economic increases such as greater hospitalization benefits and additional bereavement pay, also advanced for the first time a 2 percent wage increase effective in 1966. McCall did not counterpropose any specific wage demands, and he admitted that Respondent was paying

"fairly decent wages for this area." I credit Burger's testimony, which is not essentially controverted by McCall, that at this as well as other bargaining sessions Burger advised McCall that the Respondent's wages were $.30 to $.50 higher than those paid by such competitors as Air Control Products, and that McCall "would be better off first to bring our competitors up to what we were paying before he asked us for any more money." It is undenied and I find that McCall did not challenge Burger's statement with respect to the wage differential. I also find that Burger informed McCall during these meetings that Respondent would "go along with a comparable contract" which the Union might obtain from Air Control Products but that Burger would not agree to any "cherry picking" of the economic features of such contract.

On January 27 or 28, McCall agreed to various economic proposals which Burger had advanced, and further agreed to the withdrawal of a cost-of-living adjustment clause when Burger reported that Respondent could not afford this item, without requesting that Burger substantiate his inability to pay. Finally, and for the first time, McCall presented the Union's wage proposal. I find that Burger again alluded to the wage differential of $.30 to $.50 which Respondent was paying, to which McCall responded that The Stanley Works' emblem represented "dollars to me" and "we will take everything we can get or you have there except that [we] wanted more." Burger stated that Respondent could afford a 2 percent increase at the time and "that is what we were offering." McCall then requested Respondent's financial data and Burger replied that he had already furnished the only data he had ever seen and that the parent company would not provide any additional material. I find that McCall did not press

for this material, and at no time during the ensuing bargaining negotiations did McCall again bring this subject up.

The parties met once more on January 28 or 29 and agreement was reached on an increase in hospitalization benefits, as well as additional bereavement and overtime pay. Moreover, Respondent agreed to convert its proposed 2 per cent increase into a $.04 per hour increase. The parties would not further recede from their respective positions, and I find that McCall announced that "inasmuch as this looks like we are not in agreement nor are we going to be in agreement, that probably these people [employees] would go out on strike." When Burger asked what McCall would recommend to his members, McCall replied that he would "probably have to recommend to them to start a parade around the plant" because Respondent's offer of $.04 was "not enough." I credit Burger's undenied testimony that McCall had never asserted that his members would strike because of Respondent's refusal to furnish economic information and that "The only thing [McCall] said about calling a strike was unless we come up with more than what we had already offered," to which Burger remarked that "We stood firm on what we offered to him."

McCall met with the employees on January 30, 1965 to review the progress of negotiations with them. I find that McCall informed them that he had requested financial statements from Respondent but had not been supplied with them. I also find, however, that he explained each of Respondent's proposals to the employees and stated that "in casting a ballot that first if they wanted to go on a straight proposal to put yes on their ballot and if they wanted to reject the proposal to put no on their ballot."

McCall made it clear that if the employees rejected the proposals a strike would ensue. However, there is nothing in this record which convincingly demonstrates that McCall told his members that they should cast their ballots in favor of a strike because of Respondent's refusal to produce wage data, or that this refusal in any fashion was an ingredient in their negative vote which followed.[8]

The strike began on January 31, 1965 and I find that, thereafter, Respondent continued to meet and bargain with the Union and Burger in fact increased his $.04 wage proposal. The General Counsel concedes, and I find, that Respondent engaged in no conduct following the work stoppage which converted it into an unfair labor practice strike.

C. Analysis and conclusions

The General Counsel urges that Respondent violated Section 8(a)(5) of the Act on December 10, 1964 and at all times thereafter, by asserting during negotiations with the Union that it was financially unable to grant any wage increases, and by refusing to furnish economic data to support this assertion when requested by the Union to do so. He relies upon *N.L.R.B.* v. *Truitt Mfg. Co.*[9] as legal precedent for this position. By alleging that the violation

[8]When questioned as to whether the meeting of January 30 was the first at which he informed the employees that Respondent refused to submit financial statements in support of a plea of inability to meet the Union's wage demands, McCall replied in the negative and claimed that he had explained this to his members "in every meeting." McCall impressed me as a genial, conscientious and skilled representative of the Union who was obviously schooled in the niceties of labor law. However, I find his testimony in this regard implausible in view of the fact that the first wage proposal made by the Union occurred on January 27 or 28, 1965.

[9]351 U.S. 149.

in this regard stems from December 10, I must assume that the General Counsel has taken the position that, under *Truitt*, a union in lawfully entitled to the production of a Company's books and records during bargaining negotiations, *in advance of the proposal of any union economic demands*, in order to ascertain what the traffic will bear before the parties reach the bargaining table, and that a company's failure to furnish these materials constitutes a *per se* violation of Section 8(a) (5). I find nothing in the teachings of *Truitt* or in the other precedent to which the General Counsel has referred me to support this position.

In *Truitt*, as well as in additional pertinent decisions, the gravamen of the employer's offense was that he had rejected the union's economic proposals by erecting a wall of poverty behind which he steadfastly hid. In those cases, it was found that the employer's mechanical refusal to divulge any economic justification for the failure to meet the union's proposals, in part, or whole, or not at all, stymied the scheme of free collective bargaining envisaged under the Act and cast a doubt upon its *bona fides*. However, on each occasion where a violation has been found, it was the employer's resistance to a *preliminary union demand* with a plea of poverty and a rigid refusal to back up such a plea with financial data which triggered the illegality. The reason for these decisional results seems clear. It is an established fact of industrial life that unions exist for the purpose of extracting economic gains for its members, and employers operate business enterprises for profit. Collective bargaining in a society of economic democracy seeks as its goal to accommodate both. It is also an established fact that *unions* make demands in industrial baragaining, and it is only when an employer resists them in an illegal manner that the National Labor

Relations Act comes into play. It is now hornbook law that an unlawful refusal to bargain does not occur unless an employer declines to discuss a mandatory subject of collective bargaining with a union,[10] such as wages. I am hard pressed to understand how a refusal to negotiate can take place when a demand for the discussion of such a subject has not been made by a labor organization. To follow the General Counsel's thesis to its logical conclusion, a union need only make a blanket demand for a myriad of employer records at the outset of negotiations, without advancing any concrete proposals of its own, and, if he refuses to produce any data the union may thereafter charge him with a violation of the Act in the event he fails to meet its subsequent contract demands. I feel assured that this is not the state of the law at the present, and the General Counsel has not convinced me contrariwise.

I have heretofore found that the Union had advanced no wage proposals to Respondent until a meeting of the parties on January 27 or 28, 1965. I conclude that, prior to those dates, the Union was not entitled to the production of Respondent's financial statements and that Respondent did not violate Section 8(a)(5) by refusing to make them available. Nor am I convinced that Respondent reacted in an unlawful manner when McCall first proposed the Union's wage figure and Respondent declined to furnish any data other than the reports of The Stanley Works which were mailed to McCall on January 6. Throughout its negotiations with Respondent, the Union was engaged in simultaneous bargaining relations with Air Control Products, a competitor of Respondent's which, as I have heretofore found, paid between $.30 and $.50 less than Respondent, a fact which was constantly brought to McCall's

[10] See *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342.

attention by Burger and which the former accepted. In my opinion, a fair appraisal of all the evidence establishes that Burger expressed concern over this wage differential because its competitive position was being endangered, and insisted that the Union attempt to escalate the wages paid by Air Control Products before Respondent would yield to a wage increase greater than the $.04 hourly rate. In short, Burger decided to stand "firm" on his wage offer until the Union obtained a contract from this competitor which increased the latter's wage scales. As "It is elemental that firmness of a bargaining position does not constitute bad faith,"[11] I conclude that the Respondent's refusal to accede to the Union's wage proposal on January 27 or 28 was not grounded on a claim of financial inability to pay but was premised on a claim that it was paying in excess of the rates prevailing in the same competitive labor market. I therefore conclude that any refusal by Respondent to furnish additional financial data to the Union on the foregoing dates was privileged and was not violative of Section 8(a) (5).[12]

However, assuming *arguendo* that Respondent did in fact plead poverty in response to the Union's wage demands, I am nevertheless persuaded that it did not thereby offend the provisions of Section 8(a) (5) by failing to substantiate this plea. The primary issue to be resolved in assessing statutory culpability in this area is whether such failure manifested an attitude of bad-faith bargaining on behalf of Respondent. In *Truitt*, the Supreme Court observed:

---

[11]See *N.L.R.B.* v. *Empire Terminal Warehouse Co.*, F.2d (C.A.D.C.), 61 LRRM 2065.

[12]See *Ibid; United Fire Proof Warehouse Co.* v. *N.L.R.B.*, F.2d (C.A. 7), decided February 1, 1966.

> "We think that in determining whether the obligation of good faith bargaining has been met the Board has a right to consider the employer's refusal to give information about its financial status."[13]

However, that tribunal went on to state:

> "We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. *Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.*"[14] (emphasis supplied).

In the instant case, Respondent, as early as October 19, 1964, when the first negotiating meeting took place, volunteered to increase hospitalization benefits. At subsequent meetings prior to the strike, it added an extra day of bereavement pay, agreed to overtime pay for Saturday work, and acceded to a number of the Union's other demands. It provided the Union with copies of Respondent's pension plan and readily consented to discuss the insurance plan and provide any information which the Union sought on this subject. It is undisputed, as I have heretofore found, that Burger made no attempt to "hoodwink" McCall about the fact that Respondent had made a small profit in 1963 and a lesser one in 1964, that Respondent always

---

[13] *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U. S. 149, 152.
[14] *Ibid* at pp. 153-154.

stood ready at every bargaining session before the strike to meet with McCall and discuss "anything he wanted to discuss," and that the parties met on several occasions after the strike and continued to discuss wages and other terms and conditions of employment. Indeed, McCall himself testified that Respondent made additional, although unidentified, wage concessions after the work stoppage.

In my opinion, the foregoing course of conflict hardly portrays Respondent as a "hard-hearted Hanna" bent upon a studied effort to shirk its statutory obligations, and I would note that the General Counsel has not charged Respondent with a general refusal to bargain in his complaint. Accordingly, I conclude that the General Counsel has failed to make out a case that Respondent demonstrated an attitude of bad faith when it declined to supply financial data of the Union on January 27 or 28, 1965.

In sum, I conclude that the Respondent did not engage in unfair labor practices prior to the strike on January 31, 1965. It necessary follows, and I further conclude, that the work stoppage was not caused by any conduct on the part of Respondent which was statutorily proscribed, and that the strike was economic in character from its inception.

The complaint also alleged that Respondent violated the provisions of Section 8(a)(5) by affording nonstriking employees with food and beverages between February 1 and 8, 1965, without prior consultation with the Union. I have heretofore found that, when the strike began, Respondent's food caterer refused to cross the Union's picket line and that Respondent then sought the services of a substitute caterer. For a period of eight days, the latter delivered sandwiches and beverages to the plant in a private automobile because of the refusal of its truck-

drivers to enter the plant premises. It is undisputed, and I have found, that these food products were not broken down individually as to price and that the Respondent was unable to determine how to assess the nonstriking employees for this service, with the result that Respondent paid for them. It is also uncontroverted that, after February 8, the substitute caterer dispatched its truck to the plant and the employees purchased food in the same manner as they had done prior to the work stoppage.

Apart from a simple recitation of this allegation, the General Counsel's brief is profoundly silent on this issue and no argumentative support or case citation has been offered. This is not a case where an employer is charged with attempting to discourage union membership in violation of Section 8(a)(3) by offering free lunch and breakfast to employees, or with interfering with, restraining, or coercing employees in their right to retain or refrain from retaining membership in a labor organization in violation of Section 8(a)(1). The singular charge is that Respondent provided services out of its own pocket without consulting the Union for a limited period of time and under distress conditions which were reasonably explained. I would note that none of the charges filed in the proceeding by the Union specifically allege this action by Respondent constituted statutorily proscribed misconduct, and that the Union at no time during bargaining sessions protested to the Respondent over the taking of this action. In my opinion, this type of allegation in a complaint portrays the General Counsel as hen-scratching on hard ground in search of seed which is not there. I conclude that Respondent did not violate Section 8(a)(5) when it provided employees with free food and beverages during the period of February 1 to 8, 1965, under the circumstances detailed herein.

The complaint further charges Respondent with a violation of Section 8(a)(5) by asserting that Respondent would not negotiate with the Union unless the latter withdrew charges which it filed with the Board. During the bargaining meeting on February 12, 1965, Burger remarked that he could not "think very well with that [the charges] hanging over my head" and suggested that McCall rescind them. It is undisputed, and I have found, that Burger did not condition future bargaining upon the withdrawal of the charges, and that the Union and Respondent continued to bargain on several occasions following this meeting. I find no merit in this allegation in the complaint and shall therefore recommend that it be dismissed.

With respect to the alleged violations of Section 8(a)(3) which are enumerated in the pleadings, the General Counsel admitted on the record that they must fall in the event that the strike is found to be an economic strike at its inception, because all strikers had been permanently replaced prior to their unconditional offer to return to work, because he had no independent evidence to proffer in support of his contention that the returning strikers had received disparate treatment at the hands of the Respondent or that Respondent discriminated against strikers who were not recalled to work, and because Respondent had engaged in no conduct following the commencement of the strike which converted the work stoppage into an unfair labor practice strike. I have heretofore concluded that the strike was economic in character at its inception. In view thereof, and based upon the General Counsel's concessions, I conclude that the alleged violations of Section 8(a)(3) lack legal substance and must be dismissed.

Conclusions of Law

Respondent has not engaged in conduct violative of Section 8(a)(5), (3) and (1) of the Act.

RECOMMENDED ORDER

The complaint herein should be, and it hereby is, dismissed.

Dated, Washington, D. C.

MAX ROSENBERG

Trial Examiner

APPENDIX "C"

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,193

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Intervenor.

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571,

Intervenor.

Filed November 21, 1968, United States Court of Appeals for the District of Columbia Circuit.

JUDGMENT

Before: BASTIAN, Senior Circuit Judge, and BURGER and McGOWAN, Circuit Judges.

THESE CAUSES were submitted to this Court upon petitions to review, and a cross-petition for enforcement of, an Order of the National Labor Relations Board dated August 3, 1967, against Stanley-Artex Windows, Division of the Stanley Works, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on April 8, 1968, and has considered the briefs and transcript of record filed in these causes. On September 3, 1968, the Court being fully advised in the premises, handed down its opinion denying the petitions for review, and granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Company's Petition for Review in case No. 21,343 and the Union's Petition for Review in case No. 21,193 are denied, and it is

FURTHER ORDERED AND ADJUDGED by the Court that the said Order of the National Labor Relations Board in said proceeding be enforced, and that Stanley-Artex Windows, Division of the Stanley Works, its officers, agent, successors, and assigns abide by and perform the directions of the Board in said Order contained.

Walter A. Bastian

Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Warren E. Burger

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Carl McGowan

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX "D"

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 17163

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, LOCAL 5571,

Petitioner,

APPENDIX "D"

NATIONAL LABOR RELATIONS BOARD,

Respondent,

STANLEY-ARTEX WINDOWS, DIVISION OF
STANLEY WORKS,

Intervenor.

No. 21348

STANLEY-ARTEX WINDOWS, DIVISION OF THE
STANLEY WORKS,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, LOCAL No. 5571,

Intervenor.

APPENDIX "D"

APPENDIX "D"

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1968

No. 21193

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STANLEY-ARTEX WINDOWS, DIVISION OF STANLEY WORKS,

Intervenor

No. 21343

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL No. 5571,

Intervenor

Before: Bastian, Senior Circuit Judge, Burger and McGowan, Circuit Judges, in Chambers.

Filed January 2, 1968, United States Court of Appeals for the District of Columbia Circuit.

ORDER

On consideration of the petition for re-hearing filed in the above-entitled cases by Stanley-Artex Windows, division of the Stanley Works, it is

ORDERED by the Court that the aforesaid petition for re-hearing is denied.

Per Curiam.

Senior Circuit Judge Bastian did not participate in the foregoing Order.

APPENDIX "E"

APPENDIX "E"

APPENDIX "E"

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1968

No. 21,193

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Intervenor

No. 21,343

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL No. 5571,

Intervenor

Filed February 3, 1969, United States Court of Appeals for the District of Columbia Circuit.

Before: Bastian, Senior Circuit Judge; and Burger and McGowan, Circuit Judges, in Chambers.

ORDER

On consideration of the motion of Stanley Artex Windows, Division of the Stanley Works, to recall the mandate and stay reissuance thereof, it is

ORDERED by the Court that the mandate is recalled and counsel for respondent, National Labor Relations Board, is directed to return to the Clerk of this Court the certified copies of the opinion and judgment previously issued to the Board on January 10, 1969.

The Clerk is directed to stay the reissuance of the opinion and certified copy of this Courts judgment for a period of 30 days from the date of this order.

Per Curiam.

Senior Circuit Judge Bastian did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1968

No. 21,193

UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 5571,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,343

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Filed March 19, 1969, United States Court of Appeals for the District of Columbia Circuit.

Before: Bastian, Senior Circuit Judge; and Burger and McGowan, Circuit Judges, in Chambers.

ORDER

On consideration of the motion of Stanley-Artex Windows, Division of the Stanley Works to further extend the stay of the transmittal of this Court's mandate, it is

ORDERED by the Court that the aforesaid motion be granted and the Clerk is directed to stay the transmittal of the opinion and certified copy of this Court's judgment to and including March 31, 1969.

Per Curiam.

APPENDIX "F"

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. .....,

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 2nd, 1969.

S/ EARL WARREN

Chief Justice of the United States.

Dated this 7th day of March, 1969

APPENDIX "G"

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. 151, et seq.):

29 U.S.C. 158 (a)(1):

"(a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

APPENDIX "G"

29 U.S.C. 158 (a)(3):

"(a) It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . ."

29 U.S.C. 158 (a)(5):

"(a) It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees."

APPENDIX "G"

APPENDIX "G"

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*).

29 U.S.C. §158 (a) (1):

> "(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . . "

29 U.S.C. §158 (a) (3):

> "(a) It shall be an unfair labor practice for an employer — . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . . "

29 U.S.C. §158 (a) (5):

> "(a) It shall be an unfair labor practice for an employer — . . . (5) to refuse to bargain collectively with the representatives of his employees, ... "

29 U.S.C. §158(d):

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . . "

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement:	
A. The Board's findings of fact	2
B. The decisions below	7
Argument	9
Conclusion	12

CITATIONS

Cases:

Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U.S. 270	11
National Labor Relations Board v. *Truitt Mfg. Co.*, 351 U.S. 149	8, 9, 10

Statutes:

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq*:	
Section 8(a)(3), (1)	8
Section 8(a)(5)	8, 10

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1347

STANLEY-ARTEX WINDOWS, DIVISION OF THE STANLEY WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-10) is reported at 401 F. 2d 434. The Board's Decision and Order (Pet. App. 11-28) are reported at 166 NLRB No. 110.

JURISDICTION

The judgment of the court of appeals (Pet. App. 67-69) was entered on November 21, 1968, and a petition

for rehearing was denied on January 2, 1969 (Pet. App. 71-72). On March 7, 1969, the Chief Justice extended the time for filing a petition for a writ of certiorari until May 2, 1969 (Pet. App. 77), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly found that the employer failed to bargain in good faith when it refused the union's request for financial data to support its claim of inability to meet the union's economic demands.

2. Whether substantial evidence supports the Board's finding that the employer's layoff of reinstated unfair-labor-practice strikers was necessitated, not by a decline in business, but by its earlier failure to discharge replacements hired during the strike.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 79-80.

STATEMENT

A. The Board's Findings of Fact

Petitioner is a Florida manufacturing firm whose employees are represented for collective bargaining purposes by the United Steelworkers of America, AFL-CIO, Local 5571. On October 19, 1964, William McCall, the union's chief negotiator, met with Plant

Manager Robert Burger to negotiate a collective agreement; the existing one was due to expire January 30, 1965 (Pet. App. 33). The Union raised such economic issues as severance pay, cost of living increases, bereavement pay, jury duty pay, and overtime for Saturday work (Pet. App. 14). On November 23, before the second bargaining session, General Manager Farley wrote a letter to all employees, in which he noted the Company's financial position in 1964 had fallen below its hopes. In pertinent part, the letter stated (Pet. App. 14):

> However, increased sales do not necessarily mean increased profits or earnings. Earnings are what is left after expenses are paid. Unfortunately, our cost of doing business has increased alarmingly, resulting in earnings not in proportion to our sales increases.
>
> Material costs have increased and we have also spent large sums in improving our working conditions by bringing the property and equipment to a better appearance and operating condition.

Subsequently, at the second bargaining session, the Union renewed its previous proposal, and submitted other economic demands—an increase in hospitalization benefits, and higher wage rates for employees who had accumulated 2 days' experience in certain jobs. At the same time, the Union requested certain Company financial data. (Pet. App. 14-15; R. 41-42).[1] Two days later, McCall, the Union agent, wrote to the Company and, referring to the Company's

---

[1] "R" references are to the joint appendix in the court below.

claims in its November 23 letter about its financial position, again requested certain financial information to enable the Union "to make a realistic approach to the joint problem".[2] The Company supplied the consolidated financial reports of its parent company, but did not furnish any financial information concerning its own operations. When the Union again requested such data, the Company stated that "it was not available and not the company's [The Stanley Works] policy to make it available" (Pet. App. 15).

Another negotiating session was held January 19, 1965. The Company's proposals included a two percent wage increase effective in 1966 (Pet. App. 37-38; R. 48-49). When McCall protested that the wage offer was inadequate, Burger, the Company negotiator, responded that "the Company as a whole is making money but we are not making money in this division, that we have to stand on our own down here and if we can't make it here, one of these days they will be closing the doors, because we have been losing money long enough." McCall then requested that Burger justify his position with the financial infor-

---

[2] Specifically McCall requested (R. 111):

1. Financial statement for the past five years, including 1964.
2. Cost of the pension plan at your plant.
3. The number of persons receiving benefits and the amount of benefits paid former employees covered by the pension plan at your plant.
4. The cost of the insurance plan now in effect, and additional cost of any proposed plan.
5. A complete copy of the Job Evaluation Plan now in effect, including all material pertinent to the plan.

mation the Union had sought previously, but Burger again stated that it was not Company policy to make such information available to any union (Pet. App. 15; R. 49-50).

On January 26, the Company wrote another letter to its employees in which it explained its proposal to the Union. The letter stated, in pertinent part (Pet. App. 15-16):

> To give you a little background, you will recall in previous letters I had mentioned to you that 1964 had been a very trying and difficult year. Even though our sales were higher, our earnings were considerably less than the year before.
>
> I think you have a right to know how your company can do more business and yet realize less profit. The reasons are not simple ones. One is the fact that we had a rash of price increases during the past twelve months. Our aluminum costs went up three different times and our glass cost was increased 15%.
>
> An even more important reason is to meet customer requirements for our new business, we had to increase the number of employees and work many hours overtime, which is very costly. The overtime has been reflected in each of your paychecks.
>
> The increased costs did not end with overtime and new trainees because all the contributing areas of cost in the plant went up accordingly with the increase of employment hours.

When the Union presented its wage proposal [3] at the next meeting, Burger responded that the Company could not "remain competitive" if it paid more than it had offered (Pet. App. 16-17; R. 73, 83). McCall again asked for the financial data that might support this position, and Burger again stated that the parent company would furnish no additional information (Pet. App. 17). At another meeting held the following day, Burger offered to convert the Company's proposal of a two percent increase into a four cents per hour increase. McCall replied that this represented no appreciable change in the Company's earlier proposal, and informed Burger that "inasmuch as this looks like we are not in agreement nor are we going to be in agreement, that probably these people would go out on strike" (Pet. App. 40-41).[4]

On January 30, the employees met and voted to reject the Company's proposals. In addition to the contract proposals, McCall discussed the Union's request for financial data and the Company's refusal to furnish it. A strike began the next day (Pet. App. 19-20, 41-42).

The Company permanently replaced all the strikers on or about February 14, 1965 (Pet. App. 17). On March 30, McCall made an unconditional offer to the

---

[3] The Union proposed a 10-cent increase immediately and another to be added in 1966, on the basis of an 18-month contract (Pet. App. 40).

[4] Subsequently the parties met with the Federal Mediation and Conciliation Service. At the first two meetings with the Service, the Company repeated its position that it was unable to offer "more than we were offering" (Pet. App. 17, n. 2).

Company on behalf of the strikers to return to their former or equivalent positions. The Company replied that it was willing to reinstate all strikers with the exception of a number whom it claimed had engaged in violence and misconduct during the strike.[5] A few days after McCall's request for reinstatement, the Company reemployed approximately 105 strikers (Pet. App. 52).

With the return of the strikers, the Company's work force totalled approximately 350 employees. At the end of April, Burger was informed by the parent company that such an enlarged work complement was not economically feasible, and that a layoff was required. Burger instructed his foremen to release approximately 42 employees on May 1, 1965. When the layoff was effected, approximately 17 former strikers were released (Pet. App. 53). Over 100 striker replacements were retained at that time (Pet. App. 20 n. 9).

B. The Decisions Below

The Board found that "[a] scrutiny of the * * * evidence, and the record as a whole, convinces us [that the Company] took the position * * * that it could not afford substantial increases in wages and other benefits, and by the January 27 or 28 meeting, and thereafter, its position had crystallized into a claim of inability to pay more than it was offering and remain competitive" (Pet. App. 17). It considered the Company's "claimed * * * inability to pay more than it

[5] At the Board hearing the Company abandoned these allegations of strike misconduct (Pet. App. 20, n. 7).

was offering and remain competitive" to be, "in effect, a plea of inability to pay" (Pet. App. 19, n. 5). It thus concluded, following *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, that the Company had failed to bargain in good faith, and violated Section 8(a)(5) of the Act, when it refused to supply financial data relevant to its assertion of inability to meet the Union's economic demands (Pet. App. 19).[6]

The Board further found that "the stalemate in negotiations to which [the Company's] refusal to furnish information contributed resulted in the strike of January 31, 1965, and that this strike must therefore be found to have been caused and prolonged by [the Company's] unfair labor practices" (Pet. App. 19). Finally, the Board found that the layoffs of the striking employees were attributable, not to a loss of business, but to the Company's "own failure to discharge strike replacements as the strikers returned to work"; therefore, such layoffs violated Section 8(a)(3) and (1) of the Act (Pet. App. 20 and n. 9).

The Board ordered the Company to furnish the Union, upon request, with information relating to the Company's claim of inability to pay the wage increases and other benefits requested by the Union; to offer all the strikers full and immediate reinstatement; to make them whole for any loss of pay and benefits resulting from the Company's refusal or delay in of-

---

[6] The Board also noted that the information which the Company refused to divulge to the Union "it chose instead to divulge only to its employees in an argumentative fashion without documentation" (Pet. App. 19, n. 6).

fering them reinstatement or from its subsequent lay-off action; and to post the customary notices (Pet. App. 23-25).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 5).

ARGUMENT

1. Petitioner's principal contention is that this Court's decision in *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, requires the Board to decide the good-faith-bargaining issue on the basis of an employer's overall, subjective good faith, so that it may not rely on a single flaw, such as refusal to furnish information, to support an unfair labor practice finding. The argument misconstrues this Court's holding in that case, in an effort to create a legal issue out of what basically involves only questions of fact and application of well settled rules. This Court held in *Truitt* that "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *Id.* at 152-153. While the Court refused to hold that employees were always entitled to substantiating evidence when economic difficulties are raised as an argument against wage increases, stating that "[t]he inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met," *id.* at 153-154, neither the

opinion, nor any of the cases petitioner cites in support of its allegations of conflict (Pet. 12), suggest that a finding of bad faith flowing from a refusal to supply requested information would be insufficient. Indeed, *Truitt* involved no finding of overall bad faith; the Court's reference to "particular facts" must be read in the light of its antecedent comment that an employer's failure to furnish information might not support an inference of bad faith where a showing was made that production "might be unduly burdensome or injurious to its business." 351 U.S. at 151. And the cases petitioner cites show a consistent willingness of the courts of appeals to enforce unfair labor practice findings based on a refusal to supply needed information.

The Board properly applied the *Truitt* principle in the present case. Petitioner did not claim or show that production of the information requested would be unduly burdensome or prejudicial. The Board considered the refusal to produce information in light of all the facts of the case—including the Company's willingness to rely on the claim of financial difficulty in explaining its position to its employees at the same time as it was refusing the Union the information that might substantiate that claim and thus advance the pending negotiations. In the light of those facts, it reasonably concluded that the Company had claimed an inability to meet the Union's economic demands without producing the proof of accuracy that "[g]ood-faith bargaining necessarily requires," 351 U.S. at 152, and thus had violated Section 8(a)(5). No *per se* rule was applied, and no case remotely suggests that

such facts would not support the unfair labor practice finding made.

2. The second question posed in the petition—whether an employer, having reinstated unfair labor practice strikers "under business conditions requiring a work force including all strikers, non-strikers and strike replacements," is required to lay off strike replacements before returning strikers in a subsequent layoff—is not presented on this record. For the Board and the court below found that the layoff was necessitated, not by a subsequent decline in business, but by the fact that the work force was abnormally enlarged due to the Company's failure to discharge strike replacements when it reinstated the returning unfair labor practice strikers.[7] Whether there is substantial evidence to support this finding is an issue which turns on particular facts and does not warrant review by this Court. In any event, as the court below stated: "The Company here offered no evidence to support its assertion that the layoffs were due to decline in business. Instead, testimony of Company officials show that the reinstatment on top of retained replacements caused the Company's labor force to exceed what it would normally be at that time" (Pet. App. 8).[8]

---

[7] Employees who strike in protest over unfair labor practices, as the Board found was the case here, are entitled to reinstatement even though this may require the discharge of replacements. See *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278.

[8] Plant Manager Burger testified (R. 77):

> Well, we had all these people that replaced the strikers and * * * I received a letter and a phone call from Mr. McCall stating that he wished to return all the strikers

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

MAY 1969.

---

unconditionally * * * and we took back * * * around 100 or 105 of them and that meant our work force was increased by 100 or 105 people more than what it normally would be at that time. And after going through the expenses and everything, people from New Britain came down and said that it would be a good idea to have a layoff and so we laid off some of these people.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 351355 706